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NO.

In The

Supreme Court of the United States

October Term, 2002

RAUL RIVERA-PEREZ,

Petitioner,

– against –

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to The United States Court of Appeals for the Second Circuit.

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I

ARE QUANTITY AND TYPE OF DRUG INVOLVED IN A CRIME ELEMENTS OF THE OFFENSE SO AS TO REQUIRE THEY BE PROVEN TO A JURY BEYOND A REASONABLE DOUBT PURSUANT TO *APPRENDI V. NEW JERSEY*?

II

DOES THE HARMLESS ERROR ANALYSIS APPLIED BY THE CIRCUIT COURT TO INSTANCES OF *APPRENDI* ERROR VIOLATE DUE PROCESS?

A. **Is It Constitutionally Permissible to Substitute Harmless Error for a Jury's Determination of Drug Type and Quantity?**

B. **Is the Constitutional Error of Failing to Adhere to *Apprendi*, and Submit to a Jury the Issues of Type and Quantity of Drugs Harmless?**

C. **Is the Application of Harmless Error as a Substitute for the Mandated *Apprendi* Findings in Circumstances Where the Statutory Sentence Range Spans 35 Years or More Constitutionally Permissible?**

III

CAN MISLEADING STATEMENTS IN A MISLEADING WIRETAP APPLICATION BE DEEMED IRRELEVANT SO AS TO SUSTAIN THE DENIAL OF A MOTION TO SUPPRESS THE EVIDENCE OBTAINED THEREBY, OR, ALTERNATIVELY, THE DENIAL OF A MOTION FOR A HEARING PURSUANT TO *FRANKS V. DELAWARE*?

IV

DOES ACTIVE REPRESENTATION MANDATE AN ADVISEMENT OF RIGHTS, THE ABSENCE OF WHICH IS SUBJECT TO A HARMLESS ERROR REVIEW?

TABLE OF CONTENTS

Questions Presented i

Table of Contents iii

List of Parties iv

Index to Appendix iv

Table of Authorities v

Opinions Below 1

Jurisdiction..... 1

Constitutional and Statutory Provisions 1

Statement of the Case 5

Why the Petition for Writ of Certiorari Should be Granted..... 10

Conclusion.....24

LIST OF PARTIES

The parties are set forth in the caption of this case.

INDEX TO APPENDIX

Opinion and Order of the First Circuit Court of Appeals decided on February 7, 2003 (*United States v. Nelson-Rodriguez*, 319 F.3d 12 (1st Cir. 2003))..... ..... 1a

TABLE OF AUTHORITIES

Case Law

Apprendi v. New Jersey, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed.2d 435 (2000)....*Passim*

Chapman v. California, 386 U. S. 18 (1967) 15, 23

Cuyler v. Sullivan, 446 U.S. 335 (1980) 21

Delaware v. Van Arsdall, 475 U.S. 673 (1986) 15, 19

Franks v Delaware, 438 U.S. 154 (1978) 18, 19

Holloway v. Arkansas, 435 U.S. 475 (1978) 22

Illinois v. Gates, 462 U.S. 213, 103 S. Ct. 2317, 76 L. Ed.2d 527 (1983).....20

Johnson v. *United States*, 520 U.S. 461 (1997) 15

Jones v. United States, 526 U.S. 227, 119 S. Ct. 1215, 143 L. Ed.2d 311 (1999) ... 10, 12

Mickens v. Taylor, 535 U.S. 162, 122 S. Ct. 1237 (2002) 21, 23

Neder v. United States, 527 U.S. 1 (1999) 16

United States v. Buckland, 289 F.3d 558 (9th Cir. 2002)(*en banc*) 12, 13

United States v. Cotton, 122 S. Ct. 1781 (2002) 14

United States v. Doggett, 230 F.3d 160 (5th Cir. 2000) 12

United States v. Foster, 469 F.2d 1 (1st Cir. 1972) 21, 22

United States v. Giordano, 416 U.S. 505, 94 S. Ct. 1820 (1974) 19

United States v. Goodine, --- F.3d --- (1st Cir. 2003), [2003 WL 1826086, Docket No. 02-1953, April 9, 2003] 11

United States v. Kahn, 415 U.S. 143, 94 S. Ct. 977, (1974) 18, 19

United States v. Nelson-Rodriguez, 319 F.3d 12 (1st Cir 2003) ..... *Passim*

United States v. Norby, 225 F.3d 1053 (9th Cir 2000) 12

United States v. Smith, 308 F.3d 726 (7th Cir. 2002) 11

United States v. Turner, 319 F.3d 716 (5th Cir. 2003) 11

United States v. Wade, 318 F.3d 698 (6th Cir. 2003) 11

United States v. Young, 877 F.2d 1099 (1st Cir.1989) (Breyer, J.) 20

Statutory Law

18 U.S.C. § 2518(1)(C) 4, 18

18 U.S.C. §3231 1

21 U.S.C. §841(b)(1)(A) ..... *Passim*

21 U.S.C. §841(b)(1)(B) 12, 17

21 U.S.C. §841(b)(1)(D) 5, 15

21 U.S.C. §846 5

28 U.S.C. §1254 1

28 U.S.C. §1291 1

Other References

U.S.S.G. §2D1.1(c)(1) and (5); 5A 17

H.R. Rep. No. 91-1444 (1970), reprinted in 1970 U.S.C.C.A.N. 4566, 4576 12

S. Rep. No. 98-225, at 355, (1984), reprinted in 1984 U.S.C.C.A.N. 3182, 3437 12

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2002

PETITION FOR WRIT OF CERTIORARI

Raul Rivera-Perez respectfully prays that a writ of certiorari issue to review the order below.

OPINIONS BELOW

The Opinion and Order of the First Circuit Court of Appeals decided on February 7, 2003 affirming the judgment of conviction is reported at *United States v. Nelson-Rodriguez*, 319 F.3d 12 (1st Cir. 2003). App., *infra*, 1a-94a. The District Court judgment was entered on May 15, 2001.

JURISDICTION

Jurisdiction of the United States District Court for the District of Puerto Rico was based on 18 U.S.C. §3231. Jurisdiction of the First Circuit Court of Appeals was based on 28 U.S.C. §1291. The United States Supreme Court has jurisdiction under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

A. Constitutional

The Fourth Amendment provides, in relevant part,

that:

> [N]o Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The Fifth Amendment provides, in relevant part, that:

> No person shall be . . . deprived of life, liberty, or property, without due process of law.

The Sixth Amendment provides, in relevant part, that:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, . . . ; to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

B. Statutory

21 U.S.C. §841(b), provides, in relevant part, that:

> Penalties [A]ny person who violates subsection (a) of this section shall be sentenced as follows:
>
> (1)(A) In the case of a violation of subsection (a) of this section involving - (i) 1 kilogram or more of a mixture or substance containing a detectable amount of heroin; (ii) 5 kilograms or more of a mixture or substance containing a detectable amount of . . . (II) cocaine, its salts, optical and geometric isomers, and salts of isomers; . . . (vii) 1000 kilograms or more of

a mixture or substance containing a detectable amount of marijuana, or 1,000 or more marijuana plants regardless of weight;

* * *

such person shall be sentenced to a term of imprisonment which may not be less than 10 years or more than life and if death or serious bodily injury results from the use of such substance shall be not less than 20 years or more than life . . ..

(B) In the case of a violation of subsection (a) of this section involving - (i) 100 grams or more of a mixture or substance containing a detectable amount of heroin; (ii) 500 grams or more of a mixture or substance containing a detectable amount of . . . (II) cocaine, its salts, optical and geometric isomers, and salts of isomers; . . . (vii) 100 kilograms or more of a mixture or substance containing a detectable amount of marihuana;

* * *

such person shall be sentenced to a term of imprisonment which may not be less than 5 years or more than 40 years and if death or serious bodily injury results from the use of such substance shall be not less than 20 years or more than life . . ..

(D) In the case of less than 50 kilograms of marihuana, . . . such person shall, . . . be sentenced to a term of imprisonment of not more than 5 years . ...

Title III of the Omnibus Crime and Control Act, 18

U.S.C. 2510-2522 (2000) provides in relevant part that:

> 2518. Procedure for interception of wire, oral, or electronic communications
>
> (1) Each application for an order authorizing or approving the interception of a wire, oral, or electronic communication under this chapter shall be made in writing upon oath or affirmation to a judge of competent jurisdiction and shall state the applicant's authority to make such application. Each application shall include the following information:
>
> * * *
>
> (b) a full and complete statement of the facts and circumstances relied upon by the applicant, to justify his belief that an order should be issued, including (i) details as to the particular offense that has been, is being, or is about to be committed, (ii) except as provided in subsection (11), a particular description of the nature and location of the facilities from which or the place where the communication is to be intercepted, (iii) a particular description of the type of communications sought to be intercepted, (iv) the identity of the person, if known, committing the offense and whose communications are to be intercepted;
>
> (c) a full and complete statement as to whether or not other investigative procedures have been tried and failed or why they reasonably appear to be unlikely to succeed if tried or to be too dangerous.

STATEMENT OF THE CASE

Rivera, along with 12 co-defendants, was the subject of a One Count Superseding Indictment issued by the District of Puerto Rico Grand Jury on February 5, 1998, charging conspiracy to possess with intent to distribute in excess of one thousand (1,000) kilograms of cocaine; five (5) kilograms of heroin; and five thousand (5,000) pounds of marijuana, in violation of 21 U.S.C. §846. App., *infra*, 3a.

Two separate trials were held. The first trial concerned six defendants who were convicted on October 1, 1999. App., *infra*, 3a. The petitioner along with one other co-defendant was convicted in the second trial on September 29, 2000. *Id.*

On April 18, 2001, petitioner was sentenced to life imprisonment with an additional five-year term of supervised release. App., *infra*, 14a.

A. The Investigation

The following facts are taken from the statement of facts appearing in *United States v. Nelson-Rodriguez*. *App.*, infra, 5a-6a.

> An FBI investigation of the conspiracy, led by FBI Special Agent Michael Plichta, began when Jorge Hernandez-Miller ("Hernandez") agreed to infiltrate a drug trafficking organization run by Rivera and serve as a confidential informant ("CI"). Hernandez had been convicted in a 1993 drug importation case known as the "Al Capone" case and served 36 months in jail, a reduced sentence because he had cooperated with the government in that case as well. In 1997, two years after Hernandez was

released from prison, he told the FBI that he wanted to help apprehend individuals from the Al Capone case who were still at large. Hernandez said he wanted to cooperate with the government because he feared for the safety of himself and his family; some of the Al Capone individuals still at large, he claimed, broke into his house while he was in prison. Under his agreement with the FBI, Hernandez was to receive twenty-five percent of the forfeitures made as a result of his cooperation. By September 7, 1999, he had received $21,000.

In the course of their interactions, Hernandez heard Rivera mention names of coconspirators, including Caribe and Bonet, who knew that Hernandez had cooperated with the government in the Al Capone case. Hernandez, fearing that these conspirators could have exposed him as an informant, introduced another CI, Jose Diaz, as his employee. He hoped to have Diaz attend any meetings where the people in attendance might recognize Hernandez from his time as a drug trafficker.

Hernandez and Diaz were the government's main witnesses at both of the trials. A third principal government witness, Luis Torres Orosco ("Torres"), was a charged defendant who pled guilty and testified about his involvement in the conspiracy.

The government also played numerous audiotapes of conversations in which the defendants discussed their drug trafficking activity. The FBI investigators had obtained tapes both from consensual recordings made by the CIS and from a wiretap on a cellular phone that Hernandez sold to

Rivera.

App., *infra*, 5a-7a.

B. The Conspirators

The Indictment charged a conspiracy which began "no later than in or about April 1997 and continued until November 1997," the date that arrests began. App., *infra*, 6a-7a. The Indictment named petitioner and twelve others, specifying petitioner to be the leader of the organization. Id. at 7a.

C. Obtaining the Wiretap Orders

Although the investigation relied heavily upon Hernandez's infiltration into the confidences of petitioner which resulted in 80 consensual recordings, the government made three applications, commencing on June 24, 1997, to the district court for wire interceptions on their own phone which was given to petitioner by Hernandez. A286-A471.[1]

The serious infirmities of the search affidavits were set forth in motions to the district court and outlined again to the Circuit Court. *See* App., *infra*, 25a-28a, 30a. That the wiretap affidavits contained numerous omissions and misrepresentations was clearly acknowledged by the Circuit Court. "We are concerned that such significant omissions could thwart the intent of Title III and mislead an issuing judge, who relies on the government to present the full case for its belief in probable cause, including any

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[1] References proceeded by "A" are with respect to the Appendix filed in the Circuit Court of Appeals for the First Circuit.

contraindications." App., *infra*, 29a-30a.

The most significant omissions concerned the reliability of Hernandez, the government's main witness. With respect to Hernandez, the government deliberately failed to divulge his identity because it knew that the reviewing judge had previously found him to be less than trustworthy. *See*, App., *infra*, 29a (the Circuit Court characterized the affidavit as being, "to put it mildly, economical on this point"). The government further falsified Hernandez' credibility by stating obliquely that "there is no information currently available which indicates that [Hernandez] has been less than truthful at any time with regard to this investigation." A295.

Additionally, critical information was omitted from a related wiretap in New York, as was a listing of the actual number of participants who had already been identified in the investigation. A 292-295.

D. The Drug Importation Plans

Five drug importations were alleged to have been planned during the trial, (1) importation of 1,100 kilograms of cocaine; (2) 250 kilograms of cocaine; (3) 36 kilograms of cocaine; (4) 8 kilograms of heroin; and 700 kilograms of cocaine, but no drugs were ever recovered. App., *infra*, 8a-14a.

E. Pre-trial Motions

Motions for suppression, or alternatively, for a *Franks* hearing were denied to all defendants. App., *infra*, 25a-31a.

F. The Trial and Jury Instructions

Counsel for petitioner requested a special verdict and an instruction to the jury that they must determine the amount of drugs. The court denied these requests. App., *infra*, 64a.

G. The Conviction, Post Trial Motions and Sentence

The jury found the Petitioner guilty as to the sole count charged. App., *infra*, 3a.

Prior to sentencing, petitioner, through new counsel, moved for a new trial pursuant to Rule 33. Among other arguments, petitioner asserted that the court failed to conduct a hearing concerning the active joint representation by trial counsel (Edgar Vega) of both petitioner and a co-defendant Julio Ortiz Guevara,("Ortiz") who had been tried in 1999 before the same district court judge. Ortiz was awaiting sentence at the time of counsel's joint representation. Petitioner was therefore not apprised of his right to conflict free representation. App., *infra*, 47a-48a.

On April 18, 2001, the court imposed sentence. Over counsel's objections, the court applied a four-level leadership adjustment. *See* A868-875. Further, the court disagreed that *Apprendi* required that petitioner be sentenced according to the lowest quantum of marijuana under 21 U.S.C. §841(b)(1) due to the failure of the jury to determine the quantity or type of drug involved.

Thus, the court found that petitioner's base offense level was 38, for more than 150 kilos of cocaine; that his adjusted offense level was 42, after a leadership adjustment; and that the resulting guideline required a sentence of life imprisonment. A868-875.

On August 1, 2001, the District Court denied

petitioner's Rule 33 motion. A820-827, *See also* App., *infra*, 48a. The United States Court of Appeals for the First Circuit affirmed the district court's rulings. App., *infra*, 5a.

WHY THE PETITION FOR WRIT OF CERTIORARI SHOULD BE GRANTED

QUESTION I

ARE QUANTITY AND TYPE OF DRUG INVOLVED IN A CRIME ELEMENTS OF THE OFFENSE SO AS TO REQUIRE THEY BE PROVEN TO A JURY BEYOND A REASONABLE DOUBT PURSUANT TO *APPRENDI V. NEW JERSEY?*

This case presents the opportunity to further address the important issue of distinguishing between "elements" of an offense and "sentencing factors" pursuant to *Apprendi* and its predecessors. In *Apprendi v. New Jersey,* 530 U.S. 466, 490, 120 S. Ct. 2348, 147 L. Ed.2d 435 (2000), this Court held that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Apprendi* followed in the footsteps of *Jones v. United States,* 526 U.S. 227, 229, 242-52, 119 S. Ct. 1215, 143 L. Ed.2d 311 (1999).

Apprendi reversed the New Jersey's courts' findings that a hate crime enhancement allowed by a New Jersey statute was a traditional sentencing factor, and, as such, was not an element of the offense that needed to be founded by a jury beyond a reasonable doubt. *Apprendi*, 530 U.S. at 471-73. The New Jersey statute extended the term of imprisonment beyond the penalty range for the offense if the

trial court found, by a preponderance of the evidence, that the "defendant in committing the crime acted with a purpose to intimidate an individual or group of individuals because of race, color, gender, handicap, religion, sexual orientation or ethnicity." This Court held that the increase in the statutory maximum penalty violated the appellant's constitutional rights to due process and a jury trial because it "remove[d] from the jury the assessment of facts that increase the prescribed range of penalties to which a criminal defendant is exposed." *Id.* at 490.

The First Circuit in *Nelson-Rodriguez* acknowledged that "defendants were entitled to some form of jury determination as to quantity," App., *infra*, 59a, but then determined that the failure to do so was "harmless error." *Id.* at 65a-71a. In *United States v. Goodine*, --- F.3d --- (1st Cir. 2003), [2003 WL 1826086, Docket No. 02-1953, April 9, 2003 at *6], the First Circuit held that "drug quantity for purposes of §§841 is a sentencing factor that may be determined by a preponderance of the evidence," thereby seemingly rendering the application of harmless error moot. A determination of whether the application of a harmless error analysis is appropriate, first requires a decision as to whether the quantity and type of drugs are elements of the offense or sentencing factors. It is therefore necessary to resolve the element/sentencing factor issue to afford to Rivera relief from the errors committed below.

A split among the circuits exists concerning whether or not drug-quantity delineations set forth in 21 U.S.C. §§841(b)(1) are sentencing factors that should be determined by a preponderance of the evidence, *United States v. Wade*, 318 F.3d 698, 705 (6th Cir. 2003); *United States v. Smith*, 308 F.3d 726, 740 (7th Cir. 2002); *United States v. Goodine*, *supra* [2003 WL 182686 at 6]; or elements of the offense such that

"if the government seeks enhanced penalties under 21 U.S.C. §§841(b)(1)(A) or (B), the [drug] quantity must be stated in the indictment and submitted to the jury for a finding of proof beyond a reasonable doubt." *United States v. Doggett*, 230 F.3d 160, 164-165 (5th Cir. 2000). *Also, United States v. Turner*, 319 F.3d 716, 722-723 (5th Cir. 2003); *United States v. Buckland*, 289 F.3d 558, 568 (9th Cir. 2002)(*en banc*); *United States v. Norby*, 225 F.3d 1053 (9th Cir 2000).

As this Court has explained, "[m]uch turns on the determination that a fact is an element of an offense rather than a sentencing consideration, given that elements must be charged in the indictment, submitted to a jury, and proven by the Government beyond a reasonable doubt." *Jones v. United States*, *supra* at 232. *Apprendi* acknowledged, however, that the distinction between elements and sentencing factors are "constitutionally novel and elusive." 530 U.S. at 494. The split in the circuits warrants guidance, as was expressed by the First Circuit. *See*, App., *infra*, 61a-62a.

The legislative history of 21 U.S.C. §§841(b)(1)(A) or (B)reveals a progression of providing greater penalties for offenses involving larger amounts, not just more dangerous types, of drugs. H.R. Rep. No. 91-1444 (1970), reprinted in 1970 U.S.C.C.A.N. 4566, 4576 explains that penalties vary "depending upon the danger of the drugs involved." In S. Rep. No. 98-225, at 355, (1984), reprinted in 1984 U.S.C.C.A.N. 3182, 3437 it is reported that "[w]hile it is appropriate that the relative dangerousness of a particular drug should have a bearing on the penalty for its importation or distribution, another important factor is the amount of the drug involved."

In *Buckland*, "841(b)(1)(A) and (B) were subjected to the "relevant inquiry" posed by *Apprendi*,--"does the required

finding expose the defendant to a greater punishment than that authorized by the jury's guilty verdict?" The Ninth Circuit said it did. *Buckland, supra*, 289 F.3d at 6. Further, the *Buckland* court also explained that

> [t]h[e Seventh Circuit] approach, of requiring [drug quantity] to be proven to the jury only if the resulting sentence will be beyond the statutory maximum, but allowing it to be decided by the judge if it is not, is unworkable. As a practical matter, the prosecutor will always have to submit drug quantity to the jury.

Id. at 65a.

Petitioner Rivera submits that quantity must be determined to be an element of the offense which should be submitted to the jury. As the type of drug is inextricably linked to quantity, the same reasoning applies, as demonstrated by the language of the legislative history quoted above. Both quantity and type of drugs should be considered elements of the offense.

QUESTION II

DOES THE HARMLESS ERROR ANALYSIS APPLIED BY THE CIRCUIT COURT TO INSTANCES OF *APPRENDI* ERROR VIOLATE DUE PROCESS?

The *Nelson-Rodriguez* court held "that any error against Rivera was . . . harmless," App., *infra*, 66a, reasoning that "the government produced overwhelming evidence that the transactions in which Rivera participated involved at least half a kilogram of cocaine." *Id.* at 66a.

It cannot be overlooked, however, that this was a dry

conspiracy. *See, id.* The jury cannot be presumed to know of any particular drug or quantity. It is significant that no drugs were seized and none were observed in the plans that were discussed or alleged to have come to fruition. The jurors may have determined that there was a conspiracy and, faced with no evidence of seizures, chose not to convict beyond the limited scope of the court's instructions. Thus, to presume the jurors' determined that the type of drug was cocaine was improper and unfair in light of the evidence submitted with respect to marijuana. If a presumption is to be made, it should be made in favor of the petitioner.

In *United States v. Cotton*, 122 S. Ct. 1781 (2002) there were actual seizures of contraband, in sharp contrast to the mere conspiratorial talk presented by the government in this matter. *Cotton,* however, did not sanction punishment based upon speculation. The *Nelson-Rodriguez* decision, respectfully, does.

The First Circuit Court opined that no serious argument could be made that the jury could have convicted Rivera of conspiring with regard to an amount less than one-half of a kilogram of cocaine. This opinion, most respectfully, is based upon sheer speculation as to which witnesses the jurors found credible. Thus the mandate of *Apprendi* is critical to protect against speculation, particularly where, as here, dispositive weight could have been given to the witness testimony as to marijuana and not cocaine or heroin.

Further, the Circuit Courts ruling permits the government to prosecute an individual on general conspiracy charges alone when no drugs were recovered, knowing that at sentencing the government will achieve a sentence that reflects determinations not presented to the jury. Enabling such a tactic is unfair and should be not be countenanced by

this Court.

Thus, the sentence for the drug carrying the lowest penalty (marijuana) without quantity established is constitutionally mandated. Due to his criminal history, therefore, the maximum sentence should be ten years. 21 U.S.C. 841(b)(1)(D).

A. Is It Constitutionally Permissible to Substitute Harmless Error for a Jury's Determination of Drug Type and Quantity?

Petitioner Rivera urges that to substitute "harmless error" in place of the *Apprendi* requisite for a jury assessment of the type and quantity of drug involved is "an unacceptable departure from the jury tradition that is an indispensable part of our criminal justice system." *Apprendi, supra,* 530 U.S. at 497. Such constitutes a "structural" error subject to automatic reversal. *E.g., Johnson* v. *United States*, 520 U.S. 461, 468 (1997).

B. Was the Constitutional Error of Failing to Adhere to *Apprendi*, and Submit to a Jury the Issues of Type and Quantity of Drugs Harmless?

Whether a constitutional error is harmless was addressed in *Chapman v. California*, 386 U. S. 18 (1967). The test is whether it appears "beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." *Id.* at 24. *Delaware v. Van Arsdall*, 475 U.S. 673 (1986) set forth another test, stating that "[A]n otherwise valid conviction should not be set aside if the reviewing court may confidently say, on the whole record, that the constitutional error was harmless beyond a reasonable doubt." *Id.* at 681.

In this matter the jury did not determine type and quantity of drugs. That determination was made by the district court at sentencing. The First Circuit sanctioned Rivera's judgment through an erroneous application of harmless error review. In its opinion, the Court of Appeals did not indicate that it "conclude[d] beyond a reasonable doubt that the omitted element was uncontested and supported by overwhelming evidence, such that the jury verdict would have been the same absent the error . . .." *Neder v. United States*, 527 U.S. 1, 19 (1999).

No such conclusion is logically possible beyond a reasonable doubt because there were three types of drugs involved without specification by the jury. Thus the ruling below, is consistent with the conclusion of this Court in cases upholding the application of harmless error such as *Neder*, wherein it was observed that it is "beyond cavil here that the error `did not contribute to the verdict obtained.'" *Id.* (quoting *Chapman, supra,* 386 U.S. at 24).

The failure to submit and adjudicate drug type and quantity with respect to petitioner was erroneously deemed harmless.

C. Is the Application of Harmless Error as a Substitute for the Mandated *Apprendi* Findings in Circumstances Where the Statutory Sentence Range Spans 35 Years or More Constitutionally Permissible?

Prior to *Apprendi*, the potential exposure mandated for a violation of 21 U.S.C. §841(b)(1), that of a sentence of five years to life, was clearly without constitutional import. It was the Sentencing Guidelines, which provided the necessary

delineation of a penalty range encompassing 50 years or more, that permitted a court to sentence within such a range.

Apprendi has impacted a court's sentencing parameters by requiring the elements of a crime to be proven beyond a reasonable doubt. After *Apprendi*, broad statutory sentencing ranges bolstered by the use of harmless error renders *Apprendi's* application meaningless. This is because the statutory penalty ranges are objectively substantial, (*i.e.* 35 years, 21 U.S.C. §841(b)(1)(B)) so there is no reason to go outside the time periods set. The harmless error standard cannot be substituted for the laudable constitutional protections set forth in *Apprendi.*

The decision of the First Circuit in this matter with respect to Rivera illustrates the problem. The Circuit Court gave unsubstantiated credence to the fact that the jury made its determination based upon cocaine, despite the fact that serious and substantial sentencing consequences attach to such a decision. If the jury based its decision on marijuana, petitioner's sentencing range would have been capped at 10 years--regardless of sentencing enchancements, as opposed to the life exposure present with regard to cocaine.

Further, if Rivera had been sentenced under the Guidelines to a marijuana offense involving 4,000 pounds, *see* App., *infra,* 7a, he would have been subjected to a base offense level of 32 and a range of 135-168 months. This compares to 250 kilograms of cocaine, App., *infra*, 11a, exposing him to a base offense level of 38 and a range of 262-327. U.S.S.G. §2D1.1(c)(1) and (5); 5A.

In essence, the First Circuit deemed it constitutional to permit the sentencing court to determine by a preponderance of the evidence, the type of drug involved in the offense,

despite the clear understanding that such a determination would impact the exposure to the petitioner by a quantum of life minus ten years, and all despite the Circuit Court's assertion that a jury determination of this element was warranted. Petitioner respectfully submits that the invocation of harmless error under such circumstances is a violation of due process.

QUESTION III

CAN MISLEADING STATEMENTS IN A MISLEADING WIRETAP APPLICATION BE DEEMED IRRELEVANT SO AS TO SUSTAIN THE DENIAL OF A MOTION TO SUPPRESS THE EVIDENCE OBTAINED THEREBY, OR, ALTERNATIVELY, THE DENIAL OF A MOTION FOR A HEARING PURSUANT TO *FRANKS V. DELAWARE*?

Good faith and truthfulness of a government agent in the presentation of an affidavit in support of a wiretap application is obviously fundamental. The First Circuit, in the decision below, acknowledged that misleading statements were made by the government agent and yet, held them to be irrelevant upon review of the denial, without a hearing, of petitioner's motion to suppress. Such a holding impinges upon the integrity of the Fourth Amendment, as well as this Court's holding in *Franks v Delaware*, 438 U.S. 154, 171-72 (1978).

18 U.S.C. § 2518(1)(C) requires, the government to provide a "full and complete statement as to whether or not other investigative measures have been tried and failed or why they reasonably appear to be unlikely to succeed if tried or be too dangerous." *See, United States v. Kahn*, 415 U.S. 143,

153 p.12, 94 S. Ct. 977, 983 n.12 (1974); *United States v. Giordano*, 416 U.S. 505, 515, 94 S. Ct.1820, 1827 (1974).

False statements made intentionally or with reckless disregard, or omissions of "material" information must impact the presumption of validity afforded an affidavit. *See Franks v Delaware, supra* at 171-72. In this matter, the defendants pointed out to the First Circuit that "the affidavit relied on information from Hernandez, but failed to disclose his prior drug trafficking conviction, his past involvement with some defendants, and other indicia of his possible unreliability." App., *infra*, 29a.

The First Circuit agreed, observing that

> The affidavit was, to put it mildly, economical on this point, stating only that there was no indication that Hernandez 'has been less than truthful at any time with regard to this investigation.' This statement was crafted carefully to avoid mention of facts that would call Hernandez's trustworthiness into serious question.

Id. The *Nelson-Rodriguez* Court's concern that "such significant omissions could thwart the intent of Title III and mislead an issuing judge, who relies on the government to present the full case for its belief in probable cause, including any contraindications," *id.*, is not reflected by its decision to uphold the district court's denial of petitioner's suppression motion.

It is clear that the intent of the misleading statements was to falsely bolster the government's lead witness and informant and the need for wiretap interception. Nonetheless, the First Circuit decided that it was empowered to extract and

ignore the misleading information pursuant to *United States v. Young*, 877 F.2d 1099 (1st Cir.1989)(Breyer, J.). Subsequently, the Circuit Court deemed the affidavit sufficient to provide the requisite probable cause to issue the warrant. *Nelson-Rodriguez, supra* at 25a-29a.

The application of the *Young* technique was, it is submitted, error in view of the Court of Appeal's recognition of the seriously misleading statements to the issuing judge. Because no hearing was granted, there was no real evidence upon which the Circuit Court could rely to show that the government singled out certain aspects for verification or for misrepresentation. Material issues with respect to the reliability of the government's main witness were not corroborated. Thus, the analysis set forth in *Young*, is inapplicable.

Permitting the reviewing court to rely on other factors set forth by the same affiant believed capable of misleading the issuing judge, defies logic and fairness. More ominously, it cheapens the integrity of a sworn document and the system of jurisprudence that gives sworn statements their hallowed standing. This is clearly an affront to the Fourth Amendment that should be addressed by this Court.

Unlike the circumstance in *Young, supra*, wherein the reliability of the government witness, was sufficiently corroborated and demonstrated, *id.* at 1103 (citing *Illinois v. Gates*, 462 U.S. 213, 230-239, 103 S. Ct. 2317, 2328-33, 76 L. Ed.2d 527 (1983)), in this instance, it was part of the deception to falsely project the very government who served as the basis of the affidavit as reliable. App., *infra*, 30a.

In a circumstance where misleading statements are made to falsely bolster the credibility of the centerpiece of an

investigation, survival of a warrant based upon the affidavit must fail. This Court cannot proscribe the application of the excerpting technique described in *Young* and employed by the First Circuit to salvage a wiretap affidavit in those instances where the misleading statements falsely bolster the government's chief witness and permeate the application. Such cannot be constitutionally permissible.

IV

DOES ACTIVE REPRESENTATION MANDATE AN ADVISEMENT OF RIGHTS, THE ABSENCE OF WHICH IS SUBJECT TO A HARMLESS ERROR REVIEW?

The Federal Rules of Criminal Procedure require that the court inquire in advance in circumstances of joint representation and advise each defendant of the right to the effective assistance of counsel, including the right to separate representation. Fed. R. Crim. P. 44(c); *Mickens v. Taylor*, 535 U.S. 162, 122 S. Ct. 1237, 1241-42 (2002). Nonetheless, the district court did not advise petitioner of his right to conflict-free representation.

While the Circuit Court acknowledged that this was a violation of its dictates in *United States v. Foster*, 469 F.2d 1 (1st Cir. 1972), App., *infra*, 47a, it held that this Court's recent decision in *Mickens* constrained the protections afforded in *Foster*, by relieving the government of the burden of persuasion upon a showing of conflict.

In *Mickens*, however, this Court reaffirmed *Cuyler v. Sullivan*, 446 U.S. 335, 100 S. Ct. 1708, 64 L. Ed. 333 (1980), to the extent of reiterating that where "a defendant shows that counsel *actively represented* conflicting interests, he has [ ] established the constitutional predicate for his claim of ineffective assistance." *Id.* (quoting *Sullivan, supra*, 446 U.S.

at 350)(emphasis in original).

To not advise a defendant of potential ineffective assistance of counsel is to render this "constitutional predicate" meaningless, especially where this Court recognized the "the high probability of prejudice arising from multiple concurrent representation, and the difficulty of proving that prejudice." *Id.*; *Sullivan, supra,* 446 U.S. at 350. *Also*, *Holloway v. Arkansas,* 435 U.S. 475, 490-491 (1978). Thus, the failure to inquire into the ramifications of the active conflict warrants a presumption of prejudice.

Foster, which was decided prior to *Sullivan*, required that upon a showing of joint representation, a trial court has a duty to inquire of the defendants as to their knowledge and acquiescence to the risks and concerns that may be present in such a circumstance. In the absence of this inquiry, the burden shifts to the government to show that prejudice to the defendant was "improbable." *Foster, supra*,469 F.2d at 5.

The Circuit Court, in *Nelson-Rodriguez*, held that *Mickens* threw the burden-shifting mandated by *Foster* in doubt. App., *infra*, 49a. This is not so in the circumstance of an active conflict, as *Mickens* concerned a claim of potential conflict and not the active conflict at bar. The *Mickens* conflict stemmed from Mickens' trial attorney's prior representation of a victim killed during the course of that representation. The death of this victim was the basis of the premeditated murder charge filed against Mickens. *Id.*, 122 S. Ct. at 1239-1240. The operative conflict in *Mickens,* therefore, was a potential conflict--dispositively distinguishing it from the active concurrent representation by one counsel of two defendants that is present in this matter. *See, id.*, 122 S. Ct. at 1245.

Thus, the Circuit Court's ruling that petitioner was required to show more than just the absence of the inquiry and advisement with respect to dual representation required under *Foster*, is not mandated by *Mickens*. *Mickens*, rather, recognizes that in the situation of an active conflict there exists "the high probability of prejudice arising from multiple concurrent representation, and the difficulty of proving that prejudice." It is urged that the recognition of this precept carries with it the responsibility to protect a defendant from shouldering a burden that is acknowledged cannot be met. Thus, failure to inquire and advise where an active conflict is present cannot be deemed harmless and must rise to the level of a structural defect. *E.g., Chapman v. California*, 386 U.S. 18, 24 (1967); *Delaware v. Van Arsdall*, 475 U.S. 673, 681 (1986).

The Court of Appeals also indicated that the evidence was too scant to warrant consideration regardless of the availability *vel non* of burden-shifting. App., *infra*, 50a. Such a rationale, however, appears to overlook the acknowledgment that proof of prejudice in such circumstances is difficult. The evidence of prejudice may well be "minimal" because it is difficult to ascertain.

The Court of Appeals also noted its concern about granting to petitioner, the "undeserved `windfall'" of vacating his conviction due to the failure to inquire and advise. App., *infra*, 48a. In the situation of an active conflict, however, which thus impinges upon the right to conflict-free counsel, vacating a conviction cannot be, most respectfully, appropriately characterized as a "windfall."

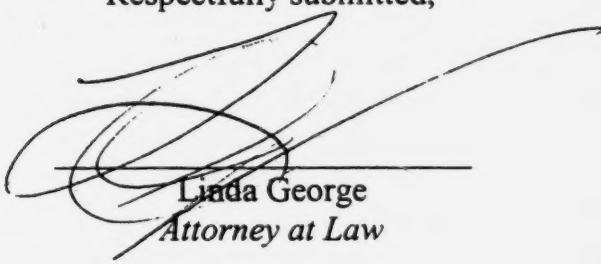
It is urged that the Court of Appeal's determination reflects a confidence that Rivera received effective assistance of counsel that is more certain than the law permits, both prior

and subsequent to *Mickens*. The trial court's failure to inquire as to the direct, active and organic conflict squarely presented before it should have been viewed as an error of constitutional dimension requiring reversal. This Court's review of this issue is necessary to define the parameters of the duty of inquiry required where there is an active conflict of representation.

CONCLUSION

The Petition should be granted.

Respectfully submitted,



Linda George
Attorney at Law

No.

In The

Supreme Court of the United States

October Term, 2002

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RAUL RIVERA-PEREZ,

Petitioner,

– against –

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to The United States Court of Appeals for the Second Circuit.

APPENDIX

Appendix A
Slip Opinion of the U.S.D.C. For the District of Puerto Rico, Dated February 7, 2003 [Pages 1a – 94a]

United States Court of Appeals

For the First Circuit

Nos. 00-1422
00-1457
00-1534
00-1560
00-1561
00-1628
01-1150
01-1873
01-2248

Volume I of II

UNITED STATES,
Appellee,

v.

MILTON A. NELSON-RODRIGUEZ; LUIS A. ROMERO-LÓPEZ; MIGUEL A. RODRIGUEZ-RIVERA; EDUARDO ARROYO-MALDONADO; CARLOS BONET-GONZALEZ; ANGEL CHEVERE-GONZALEZ; LUIS CARIBE-GARCIA; RAÚL RIVERA-PÉREZ; VICTOR M. VALLE-LASALLE,

Defendants-Appellants.

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF PUERTO RICO

[Hon. Juan M. Pérez -Giménez, U. S. District Judge]

Before

Boudin, Chief Judge,
Lynch, Circuit Judge,
and Shadur,* Senior District Judge.

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* Of the Northern District of Illinois, sitting by designation.

Appendix A
Slip Opinion of the U.S.D.C. For the District of Puerto Rico

Marlene Aponte Cabrera for appellant Nelson-Rodriguez.

Rafael F. Castro Lang for appellant Romero-Lopez.

Jose A. Suarez-Santa for appellant Rodriguez-Rivera.

Raymond L. Sanchez Maceira for appellant Arroyo-Maldonado.

Mauricio Hernandez Arroyo for appellant Bonet-Gonzalez.

Raymond Rivera Esteves for appellant Chevere-Gonzalez.

Marlene Gerdts for appellant Caribe-Garcia.

Linda George for appellant Rivera-Perez.

Luz M. Rios Rosario for appellant Valle-Lasalle.

William C. Brown, Attorney, U.S. Department of Justice, with whom H.S. Garcia, United States Attorney, was on brief for appellee.

February 7, 2003

LYNCH, Circuit Judge. Thirteen individuals were indicted on February 5, 1998 for participating in a conspiracy to possess with intent to distribute 1,000 kilograms of cocaine, five kilograms of heroin, and 5,000 pounds of marijuana, in violation of 21 U.S.C. § 846 (2000). This case involves the appeals of nine of those defendants: Milton Nelson-Rodriguez ("Nelson"), Luis Romero-Lopez ("Romero"), Miguel Rodriguez-Rivera ("Rodriguez"), Eduardo Arroyo- Maldonado ("Arroyo"), Carlos Bonet-Gonzalez ("Bonet"), Angel Chevere-Gonzalez ("Chevere"), Luis Caribe-Garcia ("Caribe"), Raul Rivera-Perez ("Rivera"), and Victor Valle-Lasalle ("Valle"). Six of the defendants -- Nelson, Rodriguez, Arroyo, Bonet, Chevere and Caribe -- were convicted at a trial in September 1999[1]. Rivera and Valle were convicted at a second trial in September 2000. Romero pled guilty before trial. This case raises a large number of issues; the more important ones include:

(1) whether the authorization for a wiretap was invalid when the government withheld certain information going to the trustworthiness of a relied-upon confidential informant in the affidavit used to apply for a wiretap order;

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[1] There were also two other defendants at the September 1999 trial who are not parties to this appeal, Julio Ortiz Guevara ("Ortiz") and Luis Diaz (whom we will refer to as "Luis Diaz" to distinguish him from a confidential informant named Jose Diaz). The jury was unable to reach a verdict with respect to Ortiz; he subsequently entered a guilty plea and has not appealed. Luis Diaz was found guilty and has not appealed his conviction.

(2) whether a jury determination as to drug quantity and type for the entire underlying conspiracy is adequate for Apprendi purposes, and when an Apprendi claim must be raised to be preserved;

(3) the meaning of "special skill" in U.S.S.G. § 3B1.3, which authorizes a two-level increase in sentence if the defendant "used a special skill, in a manner that significantly facilitated the commission or concealment of the offense";

(4) a claim that the government failed to move for a substantial assistance reduction of sentence under U.S.S.G. § 5K1.1 as retaliation against a cooperating defendant for telling the truth; (5) the existence of constraints, if any, on the ability of a district judge to impose a term of supervised release in cases under §§ 841 and 846 that is in excess of the term contemplated by U.S.S.G. § 5D1.2;

(6) a claim of deprivation of a right to speedy trial arising out of a 14-month period between conviction and sentencing;

(7) a claim of improper ex parte contact between a probation officer and the prosecution after the initial presentence report but before the filing of an amended report which supported a new sentence enhancement;

(8) on the review of a denial for a motion for new trial, a claim that defense counsel had a potential conflict of interest because he simultaneously represented another conspirator, who was previously acquitted but then had pled guilty, in sentencing issues resulting from a plea agreement.

Save for one aspect of a claim by Rodriguez concerning his term of supervised release, we reject all of the claims raised by defendants. The length of the opinion is mandated by the fact that it is the equivalent of nine opinions as to the nine defendants.

With challenges to the sufficiency of the evidence, we recite the facts in the light most favorable to the jury's guilty verdicts. See United States v. Bayes, 210 F.3d 64, 65-66 (1st Cir. 2000). As to other issues, we objectively view the evidence of record. See United States v. Piper, 298 F.3d 47, 50 (1st Cir. 2002).

A. The Investigation

An FBI investigation of the conspiracy, led by FBI Special Agent Michael Plichta, began when Jorge Hernandez-Miller ("Hernandez") agreed to infiltrate a drug trafficking organization run by Rivera and serve as a confidential informant ("CI"). Hernandez had been convicted in a 1993 drug importation case known as the "Al Capone" case and served 36 months in jail, a reduced sentence because he had cooperated with the government in that case as well. In 1997, two years after Hernandez was released from prison, he told the FBI that he wanted to help apprehend individuals from the Al Capone case who were still at large. Hernandez said he wanted to cooperate with the government because he feared for the safety of himself and his family; some of the Al Capone individuals still at large, he claimed, broke into his

house while he was in prison. Under his agreement with the FBI, Hernandez was to receive twenty-five percent of the forfeitures made as a result of his cooperation. By September 7, 1999, he had received $21,000.

In the course of their interactions, Hernandez heard Rivera mention names of coconspirators, including Caribe and Bonet, who knew that Hernandez had cooperated with the government in the Al Capone case. Hernandez, fearing that these conspirators could have exposed him as an informant, introduced another CI, Jose Diaz, as his employee. He hoped to have Diaz attend any meetings where the people in attendance might recognize Hernandez *from* his time as a drug trafficker.

Hernandez and Diaz were the government's main witnesses at both of the trials. A third principal government witness, Luis Torres Orosco ("Torres"), was a charged defendant who pled guilty and testified about his involvement in the conspiracy. The government also played numerous audiotapes of conversations in which the defendants discussed their drug trafficking activity. The FBI investigators had obtained tapes both *from* consensual recordings made by the CIs and *from* a wiretap on a cellular phone that Hernandez sold to Rivera.

B. The Conspirators

The defendants were part of a drug operation led by Rivera that imported drugs *from* Colombia to sell in Puerto Rico and New York. According to the indictment, the conspiracy began "no later than in or about April 1997" and continued until November 1997, when arrests in the case began. The evidence at the two trials showed, inter alia, four planned importations of cocaine from Colombia (only one of which was successful), one planned importation of heroin from St. Maarten, and one planned importation of more than 4,000 pounds of marijuana.

Each defendant had a different role in the conspiracy. Rivera was the leader and Arroyo was his lieutenant. They arranged for the boat, navigational charts, and radios necessary to import the drugs. When Arroyo became too greedy, Rivera replaced him with Valle.

Bonet was to captain Rivera's receiving boat, which would take the drugs to Puerto Rico in at least one of the early shipments. On the fourth planned importation, Ortiz was to serve in this role. Torres was the coordinator of certain drug shipments. Caribe oversaw security at the drop-off point on shore and, through his brother-in-law, Mark Figueroa-Jarvis ("Figueroa"), helped arrange for the distribution of the drugs in New York. Nelson was involved in distribution of the imported drugs, and was also captured on audiotape discussing with Rivera plans to import between 6,000 and

10,000 pounds of marijuana. Rodriguez took the cocaine from Puerto Rico to New York, where he sold it to Figueroa.

CI Hernandez, meanwhile, worked with the Colombians to get the drugs to Puerto Rico, and also traveled to St. Maarten on Rivera's behalf to negotiate the heroin importation. CI Diaz participated in various activities of the conspiracy, including trips to Colombia and St. Maarten. Hernandez also introduced an undercover agent of the U.S. Customs Service, Agent Victor Rosa, as the captain of a boat that was to bring cocaine from Colombia to a rendezvous with Rivera's boat.

C. The Drug Importation Plans

1. Planned Importation of 1,100 Kilograms of Cocaine

CI Hernandez testified about a planned importation of 1,100 kilograms of cocaine in early 1997. Hernandez had connections in Colombia through Humberto Arduandua, a Colombian drug trafficker with whom Hernandez had been imprisoned. Arduandua put Hernandez in contact with Rivera in the spring of 1997; he told Rivera that Hernandez could be an intermediary between the Colombian drug suppliers and Rivera's drug distribution organization to facilitate cocaine importation. As an intermediary, Hernandez was responsible for examining the boats and equipment used to transport the drugs from Colombia and the delivery site for the drugs in Puerto Rico.

Hernandez called Rivera on April 25, 1997, and the two set up a meeting later that night. This call, like many between the CIs and members of Rivera's organization, was recorded by the FBI. Hernandez met Rivera and Arroyo, whom Rivera introduced as one of his employees, at the Condado Hotel, and they began negotiating a contract to import 1,100 kilograms of cocaine from Colombia. Hernandez and Rivera agreed to the basic details of the transaction: Hernandez would arrange for the drugs to be transported from Colombia to a location approximately 35 miles off the northern coast of Puerto Rico, where Rivera's organization would pick up the drugs in their own boat and bring the drugs into Puerto Rico. Rivera told Hernandez that he wanted 25 percent of the load from the Colombians as payment and that half of the remaining load would be sold in Puerto Rico while the other half would be shipped to New York.

Two days later, Hernandez met Rivera and Arroyo to inspect the shore area where the load would be delivered. They showed him the elevated area from which Rivera's employees would watch the delivery. Rivera also told Hernandez that Arroyo had a friend who owned a car rental business where the drugs would be stored.

At their next meeting, on May 3, 1997, Hernandez met Rivera and Arroyo at a Travelodge hotel and introduced them to Rosa, the undercover agent posing as one of Hernandez's

employees. The FBI videotaped this meeting with a hidden camera. Hernandez told Rivera that Rosa would captain the boat that would bring the cocaine load from Colombia to Rivera's boat off the coast of Puerto Rico. Arroyo brought navigational charts to the meeting, which the conspirators used to pinpoint the location where Rivera's boat would pick up the drugs from Rosa. A few days later, Rivera provided Hernandez with a two meter radio, which would be used during the operation.

In the summer of 1997, Hernandez and his putative employee, CI Diaz, traveled to Venezuela and Colombia to finalize the division of the drugs between the Rivera/Hernandez organization and the Colombians. Hernandez later spoke to Rivera about how they should split their share of the cocaine load, and Rivera suggested that he and Hernandez become partners.

When Hernandez and Diaz returned from their trip, Hernandez learned that Arroyo had been replaced by Valle, another of Rivera's employees, because Arroyo had asked for one million dollars as payment for his role in the shipment. Rivera told Hernandez that they would use different equipment and a different shore area as a result of the replacement and asked Hernandez to look at both on his next trip to the island. Hernandez later met with Rivera and Valle to inspect the new boat and shore area. He also saw the house where Rivera's team would temporarily store the drugs. At

this meeting, Valle showed Hernandez a police scanner and told him that they would have "no trouble" because one of his relatives worked with the local police. The planned shipment was never made because several problems arose, including the arrest of one of the cocaine suppliers in Venezuela.

2. Successful Importation of 250 Kilograms of Cocaine

Torres, the cooperating defendant, testified about a successful shipment of 250 kilograms of cocaine that occurred on July 16, 1997. Torres was the coordinator for this shipment, and oversaw security and the distribution of the cocaine. Chevere was responsible for security when the cocaine load was delivered: he had weapons at the delivery site and made sure that the people delivering the drugs would not attempt to take the drugs back after they received payment. After the shipment was delivered, Torres and Rivera went to a nearby repair shop and divided the cocaine between them. Rivera received approximately 50 kilograms, for which he promised to pay Torres a discounted price amounting to over $600,000; Torres kept the remaining 200 kilograms. Rivera arranged for most of his cocaine to be sent to Figueroa, Caribe's brother-in-law in New York, because the price of cocaine was higher in New York. Figueroa sold the cocaine and sent some of the proceeds back to Rivera. Chevere, Caribe, and Nelson each had a role in distributing Rivera's share.

3. Attempted Importation of 36 Kiloorams of Cocaine

In the summer of 1997, Torres also became involved in the conspiracy's planned importation of 36 kilograms of cocaine. Torres testified that Rivera introduced him to Nelson. Rivera and Nelson had arranged for a 36 kilogram load of cocaine to be sent from Venezuela to Puerto Rico on a boat. Nelson's nephew, Luis Diaz, tied the load to the bottom of a boat that was going to Puerto Rico. While the boat was en route, the load was lost. The Colombians who had supplied the cocaine kidnapped Luis Diaz and threatened to kill him unless they were paid for the shipment. Torres, Rivera, and Nelson discussed ways to gain his release, but he eventually escaped on his own.

4. Planned Importation of Eight Kilograms of Heroin

On October 12, 1997, Caribe sent the CIs, Hernandez and Diaz, to St. Maarten to arrange for a shipment of eight kilograms of heroin into Puerto Rico. Hernandez and Diaz were responsible for transporting the heroin to Puerto Rico. They met with a man named Francisco and agreed that Rivera's organization would keep three kilograms of heroin, while the remaining five kilograms would either be sold or distributed by Rivera with the proceeds going back to Francisco's organization.

5. Planned Importation of 700 Kilograms of Cocaine

In July 1997, CI Diaz went to Colombia to arrange for the importation of more cocaine into Puerto Rico. Diaz testified that the Colombians agreed that Hernandez and

Diaz's organization could import 700 kilograms of cocaine into Puerto Rico and, if that shipment went well, they would be able to import larger shipments in the future. On August 16, 1997, Diaz met with Rivera and Caribe to discuss importing the 700 kilograms. During this meeting, Rivera and Caribe promised to show Diaz that they had the equipment, security, and other prerequisites to handle the importation of large quantities of cocaine. Rivera also gave Diaz a gun to give to Hernandez; Rivera said the gun was "clean" and could be used.

On October 29, 1997, Diaz met with Rivera and Bonet. They looked at the nautical charts showing where the drugs would be brought into Puerto Rico, and Bonet showed Diaz the radio that would be used during the operation. The next day, October 3D, Diaz, Rivera, Caribe, Figueroa, and Bonet met again. Bonet and Caribe conducted a test of a radio that would be used in the shipment. The FBI was able to record Bonet's voice during this test.

Diaz testified that he and Bonet conversed during their car trips to and from these meetings. Bonet assured Diaz that his team "had been in drug trafficking for many years" and "had the necessary equipment, including the boats, communication, security at the beach and the captains." Bonet also said that he had been sought by the FBI in the Al Capone case, but the FBI was unable to identify him because it did not know his full name. He said that someone named Frank

Jones had become a "snitch" and that "they were going to kill him." "Frank Jones" was Hernandez's previous alias from his time as a drug trafficker.

On November 1,1997, Diaz, Rivera, and Bonet met a third time. Caribe introduced Diaz to Ortiz, the boat captain for the shipment. Caribe told Ortiz that he would make sure that Ortiz had a working motor for his boat by the shipment date. The group made plans to meet at a future date to view the site selected for delivery of the load. There is no evidence that this meeting or the shipment ever took place, possibly because several defendants were arrested during early November.

D. Convictions and Sentences

Romero pled guilty and was sentenced to 135 months of imprisonment and 5 years of supervised release. Juries found the other eight defendants guilty as charged. They received varying sentences, as follows:

Rivera: Life imprisonment and 5 years supervised release;

Chevere: 540 months imprisonment and 10 years supervised release;

Caribe: 420 months imprisonment and 8 years supervised release;

Valle: 360 months imprisonment and 10 years supervised release;

Bonet: 360 months imprisonment and 20 years supervised release;

Arroyo: 324 months imprisonment and 20 years supervised release;

Nelson: 293 months imprisonment and 10 years supervised release;

Rodriquez: 151 months imprisonment and 15 years supervised release.

II.

On appeal, not all defendants raise every claim. The defendants who make each claim are identified in the section heading.

A. Sufficiency of the Evidence (Caribe. Rodriquez. Arroyo)

Caribe, Rodriguez and Arroyo argue that the evidence was insufficient to establish a conspiracy, or to link each of them to it individually. The guilty verdicts stand unless, viewing the evidence in the light most favorable to the prosecution, no reasonable jury could have rendered them. See United States v. Spinney, 65 F.3d 231, 234 (1st Cir. 1995). That burden is not met here.

There are three basic components to a drug conspiracy: "[T]he existence of a conspiracy, the defendant's knowledge of the conspiracy, and the defendant's voluntary participation in the conspiracy." United States v. Gomez-Pabon, 911 F.2d 847, 852 (1st Cir. 1990). "Mere association" with the conspirators or "mere presence" during activities of

the conspiracy will not, standing alone, be sufficient for conviction. Id. at 853. The statute under which these defendants were convicted, 21 U.S.C. § 846, requires no overt act in furtherance of the conspiracy. United States v. Shabani, 513 U.S. 10, 15 (1994). A conspiratorial agreement may be inferred from circumstantial evidence. See United States v. Aponte-Suarez, 905 F.2d 483, 490 (1st Cir. 1990).

Caribe and Arroyo both argue that the existence of a conspiracy was not proven, because many of the drug importation plans never came to fruition. A conspiracy need not succeed for a conspiracy conviction to stand. Indeed, the underlying act need not even be attempted. See United States v. Martin, 228 F.3d 1, 11 (1st Cir. 2000). "The gist of a conspiracy is an agreement to disobey or to disregard the law." United States v. Palmer, 203 F.3d 55, 63 (1st Cir. 2000). They also argue that various negotiations failed to produce a complete "meeting of the minds" on issues such as the exact location for the handover of the drugs at sea or the division of the proceeds. But there was a vast amount of evidence presented, including testimony from informants and numerous audiotapes, from which a reasonable jury could easily determine that an agreement existed among Rivera and his associates to work together to buy and sell illegal narcotics.

Each of the three defendants also argues that even if there were a conspiracy, the evidence was insufficient that he

knew of it and participated in it voluntarily. A reasonable jury most certainly could disagree.

There was evidence of Caribe's knowing involvement in the conspiracy's plans to import illegal drugs. For example, CI Diaz testified that he met with Caribe and Rivera on August 16, 1997 to make specific plans in connection with the importation of between 700 and 1,000 kilograms of cocaine. Diaz also testified about attending a meeting at Caribe's house on October 29, 1997. Caribe and others discussed drug smuggling plans, tested radios, and reviewed nautical charts. CI Hernandez testified that he had participated in a test of radio equipment with Caribe (as well as Rivera and Bonet) and that Rivera had told him that Caribe would supervise security at the dropoff point on the shore for a planned importation.

The evidence as to Rodriguez was that he knowingly transported Rivera's cocaine from Puerto Rico to New York, where it was sold to Figueroa, Caribe's brother-in-law. Rodriguez emphasizes that none of the CIs ever met him directly. But several intercepted telephone conversations, including two July 21, 1997 calls made by Rivera, supported his guilt, directly and indirectly. In one, Rivera told Figueroa that Rodriguez would be meeting with him in New York to deliver "shirts" (code for cocaine, according to an FBI agent who testified). In another, Rivera called Rodriguez, then in New York, to coordinate Rodriguez's meeting with Figueroa

and to discuss the price for the cocaine. A search of Rodriguez's apartment in Puerto Rico after his arrest found corroborating evidence such as airplane tickets to New York for the relevant time period and his cell phone bills.

Finally, Arroyo, who was replaced early in the conspiracy, argues that the government proved only mere presence or association. There is no further indication of his participation after his demand for one million dollars was rebuffed. Nonetheless, before that time, Arroyo's involvement in the conspiracy's plans was extensive. He joined Rivera at the initial April 25 meeting with Hernandez at the Condado Hotel. He also brought the nautical charts to the May 3 meeting, which the FBI videotaped; Arroyo looked over the charts with Agent Rosa, supposedly the captain of Hernandez's boats, to fix a location for their rendezvous.

Arroyo relies on Aponte-Suarez, 905 F.2d at 491, where this court vacated a drug conspiracy conviction for insufficient evidence. The defendant there demanded money from drug traffickers for the use of his land as an airstrip; when they refused, he introduced them to a neighbor and had no further involvement with the conspiracy. Id. Arroyo, in contrast, was an active participant up until the time his financial demands were refused. For similar reasons, Arroyo's alternate argument that he withdrew from the conspiracy is a non-starter. "[W]ithdrawal is not a defense to a conspiracy

charge if the conspiracy violation has already occurred." United States v. Rogers, 102 F.3d 641,644 (1st Cir. 1996).

The evidence about the existence of a conspiracy, and the knowing and voluntary involvement of Caribe, Rodriguez, and Arroyo, was clearly sufficient for the jury to reach a guilty verdict.

B. Pre-Trial Claims

1. Prosecutorial Misconduct (Bonet)

Bonet argues that his conviction should be vacated because of prosecutorial misconduct before the grand jury. Bonet asserts that Agent Plichta was the only witness who testified against him before the grand jury and that Plichta made two false statements. Plichta stated that the search of Bonet's house revealed a 20/40 radio and an antenna set up on a tree outside the house. At trial, Agent Juan Grajales, one of the agents who conducted the search, testified that the FBI in fact seized a CB radio and an antenna, which they found in the dining room. Agent Plichta admitted at trial that he had been mistaken. Bonet claims that no other evidence against him was presented to the grand jury and that the prosecutor encouraged Plichta to testify falsely to bolster the case.

The Supreme Court in United States v. Mechanik, 475 U.S. 66 (1986), rejected the defendant's claim that his conviction should be vacated because the prosecutor allegedly violated Fed. R. Crim. P. 6(d) by permitting two law enforcement agents to be questioned together before the grand

jury. The Court held that any error was harmless because the defendant was subsequently convicted. In such cases, "the petit jury's subsequent guilty verdict means not only that there was probable cause to believe that the defendants were guilty as charged, but also that they are in fact guilty as charged beyond a reasonable doubt." Id. at 70.

Two years later, in Bank of Nova Scotia v. United States, 487 U.S. 250 (1988), the Court carved out a narrow exception to the Mechanik rule. This exception applies only if "the structural protections of the grand jury have been so compromised as to render the proceedings fundamentally unfair, allowing the presumption of prejudice." Id. at 256-57; see also United States v. De Jesus, 230 F.3d 1, 4 (1st Cir. 2000) ("Thus, dismissal after conviction is appropriate only in cases of serious and blatant prosecutorial misconduct -- misconduct so grave that it calls into doubt the fundamental fairness of the judicial process.") (internal quotations omitted). The Supreme Court noted that this exception was consistent with past cases in which the Court had dismissed indictments after convictions because it found racial or gender discrimination in the selection of the grand jury. Bank of N.S., 487 U.S. at 256-57 (citing Vasquez v. Hillery, 474 U.S. 254 (1986), and Ballard v. United States, 329 U.S. 187 (1946)). However, we have cautioned that this exception should be "invoked infrequently, largely as a prophylactic

tool to discourage further misconduct of a like nature." United States v. Giorgi, 840 F.2d 1022, 1030 (1st Cir. 1988).

Bonet faces an additional hurdle: he did not raise his claim before the district court, and so review is only for plain error. A party claiming plain error must demonstrate (1) that there was error, (2) that it was plain, (3) that it affected the defendant's substantial rights, usually by altering the outcome, and (4) that it was sufficiently fundamental to threaten the "fairness, integrity or public reputation of judicial proceedings." United States v. Olano, 507 U.S. 725, 732-36 (1993).

The record does not establish prosecutorial misconduct, much less misconduct so egregious that it rendered the grand jury proceedings fundamentally unfair. At most there was an understandable mistake in testimony. The FBI agents involved in the case had been tracking the defendants for several months and had gathered innumerable facts about the organization. CI Diaz testified at trial that he was present when Bonet tested a 20/40 radio at his house that would be used in the planned importation of 700 kilograms of cocaine. Bonet also showed him the antenna that he had placed on a tree outside his house. The most likely explanation for Agent Plichta's misstatements is that he simply confused the radio and antenna seen by Diaz with those seized by the FBI. Given the corroborating evidence for the substance of Plichta's account, if not the exact details, his

grand jury testimony did not affect the defendant's substantial rights or seriously impair the fairness, integrity, or public reputation of the judicial proceedings.

2. Bill of Particulars (Nelson)

Nelson argues that the district court abused its discretion by denying his motion for a bill of particulars. There was no abuse of discretion.

The indictment names Nelson twice. First, it charges Nelson with initial involvement in the planned importation of 10,000 pounds of marijuana. Second, it charges that Rivera instructed Luis Diaz, Nelson's nephew, to go to Colombia to arrange for the importation of cocaine into Puerto Rico, and that Rivera and Nelson made efforts to obtain Luis Diaz's release after he was kidnapped by Colombian drug suppliers.

Nelson argues that he was not put on notice of the government's evidence at trial concerning his involvement in the attempted importation of 36 kilograms of cocaine that was lost at sea. The Colombians kidnapped Luis Diaz to ensure that Nelson would pay them for this lost cocaine. Nelson argues that the indictment does not refer to cocaine in this context and states only that he tried to gain his nephew's release, which is not a criminal act.

The indictment stated that the conspiracy involved attempts "[t]o import large amounts of controlled substances into the District of Puerto Rico," and detailed the dates of the conspiracy and the names of the coconspirators. The

indictment specifically charged the defendants with conspiracy with intent to distribute over 1,000 kilograms of cocaine. Additionally, Nelson had access during discovery to recordings of conversations between him and other conspirators discussing the importation of cocaine. Nelson did not lack a fair opportunity to prepare a defense absent a bill of particulars. See United States v. Sepulveda, 15 F.3d 1161, 1192-93 (1st Cir. 1993). United States v. Paiva, 892 F.2d 148 (1st Cir. 1989), held that the district court did not abuse its discretion in denying the motion for a bill of particulars even though the indictment did not inform the defendant of a number of transactions he allegedly aided. Id. at 154. The court there held that the indictment referred to "quantities of cocaine" and thus informed the defendant that the charge involved more than one transaction. See id at 155.

Nelson does not explain how the indictment's lack of specificity prejudiced him at trial. A defendant must show "actual prejudice" and point to "specific evidence or witnesses that the lack of particularization prevented him from obtaining." United States v. Arboleda, 929 F.2d 858, 869 (1st Cir. 1991); see also Sepulveda, 15 F.3d at 1193 ("Neither appellant convincingly relates a concrete instance of inability to prepare, untenable surprise, or other cognizable prejudice stemming from the trial court's refusal to mandate further particulars."). Nelson does not argue that he was unable to

prepare a defense to the allegations, nor does he point to any evidence that he would have presented. We reject the claim.

3. Duplicitous Indictment (Nelson, Chevere)

Nelson and Chevere argue that the indictment was duplicitous because it charged the defendants with possessing several drugs (cocaine, heroin, and marijuana) with intent to distribute. Neither defendant raised this claim prior to trial; the review is for plain error. There was no error, much less plain error, on this point. It has been clear since the Supreme Court's decision in Braverman v. United States, 317 U.S. 49 (1942), that "[t]he allegation in a single count of a conspiracy to commit several crimes is not duplicitous, for the conspiracy is the crime, and that is one, however diverse its objects." Id. at 54. The conspiracy charged here included the planned importations of cocaine, heroin, and marijuana. Each of these acts was part of a single conspiracy, and the jury instructions made clear that the jury must find as much.

Nelson also argues that the indictment was duplicitous because it charged two crimes, possession of drugs with intent to distribute and conspiracy to possess drugs with intent to distribute, in a single count of the indictment. This claim is rebutted by the plain language of the indictment, which states only that the defendants conspired to possess controlled substances with intent to distribute. The indictment does not charge the defendants with possession with intent to distribute, and the jury did not consider any such charge.

C. Wiretap Evidence (Nelson. Rodriquez. Bonet. Chevere. Caribe, Rivera. and Valle)

Defendants argue that evidence obtained from wiretaps should have been suppressed.[2] They also argue that the district court erred in refusing to hold a hearing in accordance with Franks v. Delaware, 438 U.S. 154 (1978), before it denied the motion to suppress the wiretap evidence. Although in other circumstances the failure of the government's affidavit supporting its warrant application to disclose information about the background of a CI could well lead to suppression, we ultimately find neither argument by defendants in this case to be meritorious.

1. Suppression

Congress has placed statutory requirements on warrants authorizing wiretaps, extending beyond the constitutional minimum mandated for other search warrants. See Omnibus Crime Control and Safe Streets Act of 1968, Title 111,18 U.S.C. §§ 2510-2522 (2000). See generally United States v. Lopez, 300 F.3d 46, 51-52 (1st Cir. 2002) (providing overview of Title Ill's provisions). Law enforcement authorities seeking a wiretap warrant must submit a sworn affidavit which includes "a full and complete statement of the facts and circumstances" that demonstrate

[2] This issue was the focus of Nelson's original motion for a new trial, timely filed on November 1, 1999. Because the question is thus properly before us and we answer it fully, we need not consider whether some of the other defendants may have waived the issue.

probable cause and a "full and complete statement as to whether or not other investigative procedures have been tried and failed or why they reasonably appear to be unlikely to succeed if tried or to be too dangerous." 18 U.S.C. § 2518(1). A judge considers this affidavit under the standards of Title III before issuing an order authorizing the wiretap. These restrictions are intended to ensure that authorities "make a reasonable, good faith effort to run the gamut of normal investigative procedure before resorting to means so intrusive as electronic interception of telephone calls" and that wiretapping as a law enforcement technique remains "distinctly the exception -- not the rule." United States v. Hoffman, 832 F.2d 1299, 1306-07 (1st Cir. 1987).

The issuing judge's initial decision to grant a wiretap order is subject to review in at least two different contexts. First, the trial judge may consider a motion to suppress the evidence gathered by the wiretap that the issuing judge authorized; later, an appellate court may review the trial judge's suppression ruling. See United States v. Ashley, 876 F.2d 1069, 1074 (1st Cir. 1989). Both of these later reviewing courts use the same metric to evaluate the action of the issuing judge, which is to examine the face of the affidavit and "decide if the facts set forth in the application were minimally adequate to support the determination that was made." J..Q.. (quoting United States v. Scibelli, 549 F.2d 222, 226 (1st Cir. 1977)).

Agent Plichta submitted an affidavit in support of the application on June 24, 1997. The government sought permission to tap a cellular telephone which CI Hernandez had sold to Rivera (on the pretense that it was a cloned phone that allowed unlimited calling). After discussing Plichta's experience and training, the affidavit chronicled in detail the investigation up to that point, beginning with the first contact between Hernandez and Rivera on April 25, 1997. The affidavit revealed information obtained from Hernandez's audio recordings of his conversations with defendants in both telephone calls and face-to-face meetings; the May 3 meeting that was attended by Rosa, the undercover agent, and was secretly videotaped; visual surveillance; court-authorized pen registers; and searches of toll records of several telephone numbers used by Rivera.

While the incriminating information gathered by these methods and reported in the affidavit was substantial, the affidavit stated that these methods were unlikely to uncover the full scope of the conspiracy, even if augmented by other possible techniques such as executing search warrants or issuing grand jury subpoenas. Each technique displayed just a small piece of the puzzle. Meanwhile, the conspirators made careful efforts to evade detection, such as switching telephones and vehicles and using counter-surveillance. Finally, searches or grand jury subpoenas would alert the conspirators that they were under investigation.

The defendants mainly argue that the affidavit downplayed both (a) the availability and promise of alternate investigative techniques and (b) the potential unreliability of Hernandez as a source. We consider these claims in turn.

a. Necessity of Wiretap

Defendants argue that progress made in the investigation using other methods meant that wiretapping was unnecessary. Title III requires that the affidavit show why wiretapping is necessary in place of less intrusive investigative techniques. 18 U.S.C. § 2518(1) (c). But it does not impose an exhaustion requirement. Lopez, 300 F.3d at 52. "Accordingly, the government is not required to show that other methods have been wholly unsuccessful." Ashley, 876 F.2d at 1072. Rather, "Title III demands a practical, commonsense approach to exploration of investigatory avenues and relative intrusiveness." United States v. Uribe, 890 F.2d 554,556 (1st Cir. 1989).

An eight-page section of the affidavit explained quite specifically why the investigative techniques then in use, alone *or* combined with others that had not been employed, would likely fail to uncover the full extent of the conspiracy. The affidavit's discussion of alternate methods does not fall below the standard of minimal adequacy. See United States v. Rivera-Rosario, 300 F.3d 1, 19 (1st Cir. 2002); Uribe, 890 F.2d at 556-57; Ashley, 876 F.2d at 1074-75.

Nelson also argues that the number of person-hours dedicated to the investigation at the time of the warrant -- he estimates forty-one hours -- was per se too short to demonstrate the necessity of a wiretap. There is no rule *on* the amount of time investigators must try and fail, using other methods, before turning to a wiretap application. See United States v. David, 940 F.2d 722, 729 (1st Cir. 1991). The issuing judge here had the relevant information and was able to weigh the amount of prior investigation among other relevant factors in reaching a decision *on* the necessity of the wiretap.

b. Omission of Information About Hernandez's Background

The defendants also argue that the affidavit relied on information from CI Hernandez, but failed to disclose his prior drug trafficking conviction, his past involvement with some defendants, and other indicia of his possible unreliability. The affidavit was, to put it mildly, economical on this point, stating only that there was no indication that Hernandez "has been less than truthful at any time with regard to this investigation." This statement was crafted carefully to avoid mention of facts that would call Hernandez's trustworthiness into serious question. We are concerned that such significant omissions could thwart the intent of Title III and mislead an issuing judge, who relies on the government

to present the full case for its belief in probable cause, including any contraindications.[3]

The troubling omissions here have less significance because the affidavit also included large quantities of evidence from sources other than Hernandez. Reliance on Hernandez's credibility was therefore unlikely to have been important to the issuing judge's decision. We use the technique described in United States v. Young, 877 F.2d 1099 (1st Cir. 1989) (Breyer, J.), and reach the same result as in that case. "That is to say, if we excise (or otherwise appropriately adjust) all misleading statements from the affidavit, there is still a more than adequate showing of 'probable cause.' Thus any misstatements are immaterial." Id. at 1102 (citations omitted). Even without reliance on Hernandez, the affidavit provided the issuing judge substantial basis for probable cause. There were over a dozen recorded conversations, the interactions with undercover agent Rosa, and the videotape of the May 3 meeting. On these facts, the omission of information about Hernandez's background was not a basis for suppression.

Other objections to scattered statements in the affidavit, even if they had any merit in isolation, would similarly fail because of the large quantity of evidence on which the issuing judge could rely.

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[3] At oral argument it was suggested that the government may have provided further information about Hernandez to the issuing judge orally. Even were this so, our review is limited to the four corners of the affidavit. See Ashley, 876 F.2d at 1074.

2. Franks Evidentiary Hearing

Some defendants also argue that the case should at least be remanded for an evidentiary hearing about the alleged flaws in the affidavit. A defendant seeking such a hearing must make a "substantial preliminary showing" that the affidavit included a false statement which was made either knowingly and intentionally or with reckless disregard for the truth, and that this misstatement was necessary to the finding of probable cause. Franks, 438 U.S. at 155-56, 171-72; See United States v. Adams, 305 F.3d 30, 36 n.1 (1st Cir 2002) (preliminary showing for Franks hearing requires both of these elements). A material omission in the affidavit may also qualify for a Franks hearing in place of a false direct statement, provided the same requisite showing is made. United States v. Scalia, 993 F.2d 984, 987 (1st Cir. 1993). We review the district court's denial of a Franks hearing for "clear error." United States v. Ranney, 298 F.3d 74, 77 (1st Cir. 2002). The ruling above disposes of this argument because the defendants fail to make the second required showing -- Hernandez's necessity to a finding of probable cause.

D. Other Evidentiary Rulings

1. Exclusion of Impeachment Evidence Against Hernandez

Caribe and Rivera)

Caribe and Rivera argue that the court erroneously excluded evidence that CI Hernandez had a role in the

October 30, 1992 killings of five alleged drug traffickers known as the "Mickey Motors murders." Three people were convicted for these murders. Hernandez, who acknowledged to the government that he was present during the killings, was not prosecuted. The judge excluded the evidence as collateral under Fed. R. Evid. 403.

Where, as here, the objection was not properly preserved, we review a district court's decision to admit or exclude evidence for plain error. United States v. Scott, 270 F.3d 30, 46 (1st Cir. 2001). The term "collateral," for Rule 403 purposes, refers to evidence that is likely to confuse the issues, mislead the jury, or waste time. See 1 C.B. Mueller & L.C. Kirkpatrick, Federal Evidence § 95, at 512 (2d ed. 1994). The trial court has wide discretion in determining admissibility under Rule 403, United States v. Abel, 469 U.S. 45, 54-55 (1984), since the trial judge "is more directly familiar than a court of appeals with the need for the evidence and its likely effect." United States v. Lau, 828 F.2d 871, 874 (1st Cir. 1987); see also United States v. Cintolo, 818 F.2d 980, 998 (1st Cir. 1987) (trial judge "has a front row seat which gives him a unique vantage point").

The district judge did not abuse his discretion by excluding the impeachment testimony, which would have had little probative value. The murders, which occurred in 1992, were unrelated to the drug conspiracy here, which covered events in 1997. The government was prepared to offer

testimony from multiple witnesses that Hernandez was not the killer. Further, the jury already knew that Hernandez had a history of serious criminal behavior; indeed, Hernandez himself admitted that he had been a drug dealer. Moreover, testimony by several witnesses about Hernandez's role in the murders might have confused the jury as to the issue before it.

Caribe raises two related issues. First, he argues that the trial judge violated the Confrontation Clause by denying him the right to cross-examine Hernandez with respect to his criminal past. Second, he argues that the government failed to produce and concealed reports of debriefings from prior investigations which contained allegations that Hernandez was involved in drug dealing and the Mickey Motors murders.[4] According to Caribe, this failure to produce violated Brady v. Maryland, 373 U.S. 83 (1963), Roviero v. United States, 353 U.S. 53 (1957), Giglio v. United States, 405 U.S. 150 (1972), and the Jencks Act, 18 U.S.C. § 3500. None of these separate doctrines provides grounds for relief unless the exclusion or failure to produce prejudiced Caribe's defense. United States v. Noone, 913 F.2d 20, 32 (1st Cir. 1990) (alleged Confrontation Clause violation); Brady, 373 U.S. at 87 (suppressed evidence must be material); United States v. Bagley, 473 U.S. 667, 682 (1985) (evidence is material for Brady purposes if there is a "reasonable

[4] Caribe also argues that the reports contained relevant information on Caribe's "drug quantity [and] role in the offense." We deal separately with these other issues.

probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different"); Giglio, 405 U.S. at 154 (requiring the same finding of materiality of the evidence as Brady); Roviero, 353 U.S. at 64-65; United States v. Rosario-Peralta, 175 F.3d 48, 53 (1st Cir. 1999) (Jencks Act). Since Hernandez's alleged role in the Mickey Motors murders was a collateral matter, and the defense showed at trial that Hernandez had an extensive criminal past, Caribe has failed to show any form of prejudice, and that disposes of his claims.

2. Exclusion of Alibi Evidence (Bonet)

Bonet argues that the district judge erred in excluding his alibi evidence for October 29, 1997 and October 30, 1997. The district court found Bonet provided the requisite notice of alibi too late in the trial process. Bonet adequately preserved his objection.

Defense counsel was obliged by Fed. R. Crim. P. 12.1(a) to give the government notice of an intent to offer an alibi defense within ten days of the government's written demand for such notice. There is a continuing duty to disclose if defense counsel learns of additional alibi witnesses prior to or during the trial. Id. at 12.1(c). If a party does not comply, then the testimony of its alibi (or rebuttal) witnesses may be excluded. Id. at 12.1(e). In its discretion, the court may grant

an exception for good cause to any of the above requirements. Id. at 12.1(d).[5]

Taylor v. Illinois, 484 U.S. 400 (1988), guides this court's application of Rule 12.1(d). See United States v. Portella, 167 F.3d 687, 705 (1st Cir. 1999) (holding that Taylor standard is used to review preclusion of an alibi defense). Taylor requires the court to balance the defendant's right under the Sixth Amendment to offer the testimony of witnesses in his favor against "countervailing public interests":

> The integrity of the adversary process, which depends both on the presentation of reliable evidence and the rejection of unreliable evidence, the interest in the fair and efficient administration of justice, and the potential prejudice to the truth-determining function of the trial process. . . .

484 U.S. at 414-15. "The judge should also factor into the mix the nature of the explanation given for the party's failure reasonably to abide by the discovery request, the willfulness vel non of the violation, the relative simplicity of compliance, and whether or not some unfair tactical advantage has been sought." Chappee v. Vose, 843 F.2d 25, 29 (1st Cir. 1988). We review application of the Taylor factors de novo. United States v. Levy-Cordero, 67 F.3d 1002, 1013 (1st Cir. 1995).

Bonet concedes that the government filed a request for alibi notice and served it on Bonet's counsel in February

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[5] A new version of Rule 12.1 took effect on December 1.2002. This new version changes the organization of the rule's different provisions, but does not change the analysis here. We cite to the new version.

1998. Bonet waited approximately one-and-a-half years before filing his alibi notice, near the end of the first trial, on September 22, 1999. Applying Taylor, the court denied Bonet's request as untimely.

Bonet argues that he was unaware he might need an alibi for October 29 and October 30, 1997 until CI Diaz testified for the prosecution that he met with Bonet on these dates; the defense contends that before Diaz took the stand on September 14, 1999, "the government never mentioned these two dates."

The government's request for alibi notice referred to the times the alleged offenses were committed as stated in the grand jury indictment, which alleged that Bonet (and coconspirators) committed two overt acts in furtherance of the conspiracy" [o]n or about October 30, 1997." The "on or about" language provides adequate notice for both October 29 and October 30. See United States v. Leibowitz, 857 F.2d 373, 379 (7th Cir. 1988) (where the indictment alleged that an offense took place "on or about" a certain date, the defendant is deemed to be on notice, for purpose of alibi defense, that the charge is not limited to a specific date).

Moreover, it is far from clear that there was any prejudice. Even if the indictment had provided adequate notice only for October 30, an alibi witness for October 29 alone would have been of little help to Bonet and might well have hurt his cause. The meetings on October 29 and October

30 covered the same ground: the participants reviewed how they would import 700 kilograms of cocaine into Puerto Rico. On October 30, the FBI recorded Bonet's voice as he tested the audio equipment. On the tape, Bonet brags about his drug-dealing exploits.

Bonet resorts to the good cause prong of the rule, arguing his delay in filing the alibi notice was not motivated by a desire to gain a tactical advantage. He also complains the district judge's terse statement of his decision was more akin to a finding of fact than the requisite finding of law. See Levy-Cordero, 67 F.3d at 1013 (whether to exclude alibi evidence is a question of law). Since our review is de novo, the last complaint is irrelevant. This court has never restricted the application of the sanction of exclusion to discovery violations that are willful or intended to gain a tactical advantage. Portella, 167 F.3d at 705 n.16; Chappee, 843 F.2d at 29. The exclusion of the evidence was not in error.

3. Admission of Hearsay Statements by Arduandua (Rivera)

Rivera argues error in the admission of CI Hernandez's hearsay testimony that Arduandua, the Colombian who had been incarcerated with Hernandez, said that Rivera was involved in the drug trade.[6] There was no

[6] Rivera's brief also contends that the court erred by admitting Hernandez's testimony that a person loosely associated with Rivera was responsible for a break-in at Hernandez's house. As the government correctly observes in its brief, Rivera's objection that Hernandez lacked personal knowledge of that person's involvement was sustained, and that

objection. Review is for plain error, and there was none. The admitted statement is reasonably understood as being offered, not to prove the truth of the matter asserted, but to explain why Hernandez contacted Rivera at the beginning of the investigation.

4. Admission of Evidence About Cruz Murder (Rivera)

Rivera argues error under Rule 403 in the admission of CI Hernandez's testimony about Rivera's role in the killing of Roberto Cruz, a murder alleged to have been committed in furtherance of the conspiracy.[7]

The district court did not abuse its discretion in finding that the testimony was probative. It confirmed Rivera's role in the conspiracy and tended to show that the 250-kilogram shipment had in fact been delivered. Rivera allegedly committed the murder in concert with a coconspirator and in furtherance of the conspiracy. Hernandez testified that Rivera and a subordinate killed Cruz "because of the kilos. . . [;] [Rivera] had not allowed [Cruz] to participate and [Cruz] had been stalking him." Cf. United States v. David, 940 F.2d 722, 731-33, 737 (1st Cir. 1991) (no abuse of discretion in admitting evidence against alleged ringleader of

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portion of Hernandez's testimony was excluded.

[7] Rivera's complaint about the reliability of the evidence is belied by the facts of record. Rivera stated in taped conversations that he had killed the person in the photograph on page three of the August 11, 1997 edition of El Vocero, a newspaper in Puerto Rico. That page does indeed contain a photograph of a corpse later identified as Cruz.

conspiracy concerning beating of drug courier suspected of stealing shipment).

Rivera also argues that the government violated discovery rules by disclosing an FBI Form 302 Report of Hernandez's debriefing "only days before the testimony was to be introduced." At trial, defense counsel objected to the admission of testimony by Hernandez covering topics addressed in the 302 report, including Rivera's claim of responsibility for the Cruz murder, on the grounds that the government's failure to disclose this document at an earlier date violated the Jencks Act, 18 U.S.C. § 3500. This argument fails. The Jencks Act provides that the government does not need to disclose the statement or report of a government witness "until said witness has testified on direct examination in the trial of the case." Id. § 3500(a).

E. Closing Argument and Jury Instructions

1. Objection to Prosecutor's Closing Argument (Nelson)

Nelson argued both at his trial and to us that a statement made by the prosecutor in closing argument, described below, was improper and prejudicial.

We review de novo whether the challenged statement was improper, and for abuse of discretion whether the misconduct, if any, warrants a new trial. United States v. Hernandez, 218 F.3d 58,68 (1st Cir. 2000). The standard for determining whether a new trial is warranted is:

> An improper argument to the jury that does not implicate a defendant's constitutional rights. . . constitutes reversible error only where the prosecutor's remarks were both inappropriate and harmful. Improper statements during closing argument are considered harmful if, given the totality of the circumstances, they are likely to have affected the trial's outcome. In making that determination, we focus on (1) the severity of the prosecutor's misconduct, including whether it was deliberate or accidental; (2) the context in which the misconduct occurred; (3) whether the judge gave curative instructions and the likely effect of such instructions; and (4) the strength of the evidence against the defendants.

United States v. Wihbey, 75 F.3d 761, 771-72 (1st Cir. 1996) (footnote and citations omitted). A prosecutor's comments do not rise to the level of a constitutional violation unless they "so infected the trial with unfairness as to make the resulting conviction a denial of due process." Darden v. Wainwright, 477 U.S. 168, 181 (1986) (quoting Donnelly v. DeChristoforo, 416 U.S. 637 (1974)); see 5 W.R. LaFave et al., Criminal Procedure § 24.7(h), at 562 (2d ed. 1984). The challenged statement does not implicate constitutional rights.

At the first trial, where Nelson was convicted, the prosecutor concluded a summary of the evidence against Caribe by remarking of him and two of the other defendants, "Caribe, Bonet and [Ortiz] got away, they got away from us . . . [b]ack in 1993." She next recalled Bonet's statement to Rivera and CI Diaz while they were on the way to an October 3D, 1997 meeting in Bonet's home; Bonet said that the FBI was "a bunch of suckers" who had failed to arrest him for his

role in the earlier Al Capone drug trafficking case. The prosecutor then said:

> I request very respectfully from you that they [sic] do not let them and the other defendants in this case get away with it again. Let us make sure that not one, not one kilogram of cocaine more is imported into Puerto Rico by these seven defendants. Let us make sure of that.

Nelson challenges the "let them and the other defendants in this case get away with it again." He argues there was no evidence of prior crimes on his part and that it was improper to raise the specter that he was doing it again. That is not so clear. There was evidence that Nelson had a role in the botched importation of the 36 kilograms of cocaine that were lost by his nephew, Luis Diaz.

The government argues that the trial court overruled the objection on the basis that the jury would, in context, have understood the remark to actually refer only to Caribe, Bonet, and Ortiz, and especially to Bonet's boasting of prior crimes. The use of "again" could be understood, of course, to refer to hypothetical past crimes of the other defendants and not be restricted to those defendants the prosecutor had just named. But, in context, the stray "again," if the jury thought about it at all, would most likely link back to those particular defendants. Even if "again" were understood to refer to all the defendants, we think there was no harm done and certainly do not think the wayward "again" would affect the outcome of the trial. See Wihbey, 75 F.3d at 771-72.

As to Nelson's mere generalized argument that the prosecutor made an emotional appeal to anti-drug dealing sentiment in Puerto Rico, it too fails. "Closing arguments traditionally have included appeals to emotion. . . . The outer limit on emotional appeals is generally stated as a prohibition against 'arguments calculated to inflame the passions or prejudices of the jury.'" 5 LaFave et al., supra, § 24.7 (e), at 558.

2. Requested Jury Instructions (Arroyo. Nelson)

Arroyo appeals the district court's refusal of his requested jury instruction that a conspiracy conviction is not possible if the defendant conspired only with government agents or informants. This legal point, while true, is inapplicable to the case against Arroyo. When there are at least two "true" conspirators, the involvement of a government agent or informant does not defeat the true conspirators' culpability. See United States v. Giry, 818 F.2d 120, 126 (1st Cir. 1987). The evidence at trial showed that Arroyo joined in meetings with not only CI Hernandez and Agent Rosa, but also Rivera. His unsupported suggestion that he and Rivera should be counted as each independently conspiring with the CIs and the undercover agent is unavailing.

Nelson appeals the district court's refusal to deliver requested jury instructions concerning proof of the identity of the defendant as the person who committed the crimes, mere

presence, and his defense theories of necessity and good faith. He properly preserved these requests for appeal. There was no error.

Nelson requested a separate instruction concerning the factors to consider when evaluating the identification of a defendant by a witness. The government incorrectly contends that potential misidentification was not relevant to Nelson's defense. To the contrary, his "two Nelsons" theory of mistaken identity hinged on it. The proof of Nelson's guilt was at least partly dependent on Hernandez's connection of Nelson to the voice of the person with whom he spoke on the telephone and to the person about whom Rivera and other coconspirators spoke. Defendant Nelson says he is not the Nelson in those phone calls.[8]

A district court's refusal to give a requested instruction is erroneous only if the instruction "was not substantially covered in the charge actually delivered to the jury." United States v. Gibson, 726 F.2d 869, 874 (1st Cir. 1984) (quotation omitted). Here, it was. The district court delivered a broader charge concerning the credibility of witnesses in general and the jury's responsibility to consider possible limitations on the

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[8] Nelson argues that there were "two Nelsons," the defendant and a Colombian supplier also known as Nelson. He points to a reference in the FBI affidavit seeking a wiretap warrant, in which CI Hernandez reported that he had witnessed a telephone call between Rivera and "Nelson LNU [Last Name Unknown]." "Nelson" is this defendant's last name, not his first name. In the affidavit, Rivera and Nelson are said to have discussed Rivera paying Nelson for the 36 kilograms of cocaine that were lost in transport, as well as arrangements for a future shipment.

ability of a witness to observe the facts about which he testified.

Nelson also requested an instruction that "mere presence" was insufficient for conviction. Similarly, the court explicitly instructed the jury that mere presence was not sufficient to prove a conspiracy charge, so Nelson's claim has no merit.

Nelson's asserted necessity defense[9] turns on the kidnapping of his nephew by the Colombians. Nelson sought assistance from Rivera and CI Hernandez, hoping they would intervene with the kidnappers, and Hernandez testified that he tried to do so. Rivera recommended that Nelson offer to pay the Colombians back with work on future shipments. In the end, Nelson's nephew escaped from his kidnappers unharmed. Nelson argues that his fear for his nephew's safety compelled him to do the things for which he was convicted.

A defendant must make a showing of a factual predicate for a necessity defense that is sufficient to raise a question for the jury. See United States v. Arthurs, 73 F.3d 444, 448 (1st Cir. 1996); United States v. Amparo, 961 F.2d 288,291 (1st Cir. 1992). That predicate is demanding:

> To successfully assert the necessity defense, a defendant must show that he (1) was faced with a choice of evils and chose the lesser evil, (2) acted to prevent imminent harm, (3) reasonably anticipated a

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[9] The traditionally separate defenses of necessity and duress have become increasingly blurred in modern decisions, to the point of merger. See United States v. Bailey, 444 U.S. 394, 410 (1980). We will follow the parties' lead and refer to the defense offered here as "necessity."

direct causal relationship between his acts and the harm to be averted, and (4) had no legal alternative.

United States v. Sued-Jimenez, 275 F.3d 1, 6 (1st Cir. 2001).

Here, Nelson did not proffer any evidence that he was forced to join the other defendants' conspiracy because of fear for his nephew's safety. There was no evidence that the kidnappers demanded he do so; they simply wanted their money back. It was never demonstrated that harm to his nephew was imminent, or that Nelson had no legal alternatives. Finally, there was evidence that Nelson's criminal activity continued after his nephew had escaped. In short, the evidence did not adequately support any of the required elements for a necessity defense.[10]

Nelson's separate request for a "good faith" jury instruction is misplaced, as there is no good faith defense for participating in a narcotics conspiracy. If the argument was meant to address the intent required for a conspiracy conviction, the district court instructed on that point, stating that the government must prove that a defendant "knew the unlawful purpose of the agreement and joined in it willfully; that is, with the intent to further the unlawful purpose." See Eng Enters., Inc. v. United States, 400 F.2d 58, 71 (1st Cir. 1968) (holding that a forthright instruction on specific intent is ordinarily a sufficient response to a defendant's request for a good faith instruction).

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[10] We also reject Nelson's argument, advanced pro se, that the reference to his nephew's kidnapping in the indictment transformed the necessity defense into an integral part of his charge.

F. "Supplemental" Motion for a New Trial (Nelson)

Nelson filed a timely motion for a new trial on November 1, 1999. It dealt entirely with objections to alleged flaws in the wiretap affidavit; these arguments were analyzed earlier in this opinion. On March 9, 2000, Nelson filed a "supplement" to this motion for a new trial, which raised a different set of substantive issues concerning Nelson's theory of mistaken identity. The court denied Nelson's motions for a new trial on December 15, 2000.

Nelson knew the basis for his "two Nelsons" theory of mistaken identity before and during trial, and referred to it in a motion for mistrial during the government's case in chief. The supplement does not claim to rely on any newly-discovered information available only after trial. As such, it is time-barred. See Fed. R. Crim. P. 33(b) (2) (allowing seven days after verdict for filing motions for new trial based on grounds other than newly-discovered evidence). Fed. R. Crim. P. 45(b) explicitly constrains the district court from extending the time period set out in Rule 33. See United States v. Holt, 170 F.3d 698, 702-03 (7th Cir. 1999); United States v. Hall, 854 F.2d 1269, 1271-72 (11th Cir. 1988). Construing this very late filing (on an entirely separate issue) as an amendment would violate both the letter and the spirit of both rules, and create a "back door" for untimely challenges to verdicts. Holt, 170 F.3d at 703. We refuse to do so.

G. Ineffective Assistance of Counsel (Rivera. Caribe and Nelson)

Rivera, Caribe, and Nelson raise issues concerning alleged conflicts of interest on the part of the attorneys who represented them at trial. Caribe also makes another claim of ineffectiveness of counsel unrelated to the alleged conflicts.

Rivera first raised his claim before the district court in a post-verdict motion for a new trial and made factual assertions in support of the motion. While Rivera points to a potential conflict of interest, he failed to carry his burden to show any actual negative impact on his representation, and the denial of his motion for new trial was not error.

Unlike Rivera, Caribe and Nelson did not raise their ineffective assistance arguments in front of the district court at all, and we will not entertain their fact-dependent but thinly- supported claims for the first time on direct appeal.

1. Rivera

Rivera, who was convicted at the second trial, says he became dissatisfied with his appointed counsel and hired Edgar Vega-Pabon ("Vega") as his attorney a few weeks before his trial began. Vega also represented Ortiz, who was indicted as a member of Rivera's conspiracy. Unlike Rivera, Ortiz was tried in the first trial. The jury there hung as to Ortiz, but the government pursued a retrial and Vega then negotiated a plea agreement for Ortiz. This agreement was

completed before Rivera's trial began, although Ortiz was not sentenced until after Rivera's conviction.

The district court in the second trial never inquired into the potential conflict of interest raised by Vega's representation of both Rivera and Ortiz, although the same judge presided over both proceedings and apparently was aware of Vega's role in the first trial. In its ruling denying Rivera's motion for a new trial, the district court relied on the Advisory Committee Notes to Fed. R. Crim. P. 44(c) and concluded that Vega had engaged in joint representation by working, at least for a period of time, both for Rivera on his trial and for Ortiz in preparation for his sentencing. The government does not challenge this determination of joint representation and we will assume it to be correct for purposes of this case.

Rivera's initial brief, citing United States v. Foster, 469 F.2d 1 (1st Cir. 1972), rests on the assertion that the district court's failure to conduct a hearing into the possible conflict requires a new trial. This analysis misreads Foster, which indicated at most that, when the district court does not inquire into a conflict, then on direct appeal the burden of persuasion shifts to the government to demonstrate that a negative effect from the conflict was "improbable." Id. at 5. We long ago cautioned against granting an undeserved "windfall" to defendants by vacating convictions on the basis of Foster violations "where it is more likely than not that

conflicting interests did not hamper counsel's pursuit of a potentially effective defense." United States v. Martorano, 620 F.2d 912, 916 (1st Cir. 1980); see also Brien v. United States, 695 F.2d 10, 15 (1st Cir. 1982) (" [T]he conflict must be real, not some attenuated hypothesis having little consequence to the adequacy of representation.").

Moreover, the continued vitality of the Foster burden-shifting framework is called into question by the Supreme Court's recent decision in Mickens v. Taylor, 122 S. Ct. 1237 (2002). That case involved a situation where the trial judge had "fail [ed] to inquire into a potential conflict of interest about which it knew or reasonably should have known." Id. at 1239. The Supreme Court concluded that such a failure on the trial judge's part "does not reduce the petitioner's burden of proof" to demonstrate that the potential conflict he alleges actually affected the representation he received in order to show a constitutional violation. Id. at 1244. The Mickens requirement that the defendant show the alleged conflict actually affected the representation received is not precisely the same as demonstrating prejudice. Id. at 1244 (standard "requires proof of effect upon representation but (once such effect is shown) presumes prejudice"). But Mickens does require more than the showing Rivera offered in his opening brief, filed before Mickens, by simply pointing to the absence of a Foster hearing.[11]

[11] In his reply brief, filed after Mickens, Rivera attempts to demonstrate the effect on his representation as follows: Strategies concerning the

In this case, because the likelihood of the joint representation having an effect on Rivera's defense is so minimal, it does not matter who had the burden. The district court determined, and we agree, that the government had amply shown that Rivera's defense did not suffer from any conflict. Thus, we need not, and do not, decide the burden-shifting question here.

The standard for an effect is that the defendant "might plausibly have pursued an alternative defense strategy, and that the alternative strategy was in conflict with, or may not have been pursued because of, [the attorney's] other loyalties or interests." United States v. Ramirez-Benitez, 292 F.3d 22, 30 (1st Cir. 2002); see also Reyes-Veierano v. United States, 276 F.3d 94, 97 (1st Cir. 2002) (applying same test); Brien, 695 F.2d at 15 (adopting same test).

The existence of an alternative strategy is most implausible here. Ortiz, the other defendant represented by Vega, was a minor figure in the conspiracy. Rivera, however, was the leader, and he eventually received a life sentence, the stiffest of any defendant. The suggestion that the government would have accepted a plea from Rivera in preference to one

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development of Rivera's perceived role in the organization as compared with that of Ortiz, arguments related to separate conspiracies, temporal limitations regarding the scope of independent conspiracies, proofs concerning drug quantities at Rivera's trial which differed from those in the plea entered into by Ortiz and for which Ortiz had yet to be sentenced, considerations involved in calling Ortiz as a witness, as well as plea and/or cooperation agreement overtures, for which Rivera was in competition with Ortiz, were, necessarily, influenced.

from Ortiz is untenable, even more so since Ortiz had already entered his plea before Rivera's trial began. Nor do we find any significant evidence that might have been helpful to Ortiz's sentencing but harmful to Rivera's trial, or vice versa. There is no indication that Rivera would have any good reason to call Ortiz as a witness. Finally, the potential impact of any conflict was further reduced because Rivera's previous appointed attorney remained in the case as co-counsel with Vega. In fact, it is reasonable to think that Rivera hired Vega precisely because he managed to get a hung jury for Ortiz, knowing the lawyer would complete his post-plea representation of Ortiz through sentencing. Rivera, it seems, wanted to have his cake and eat it too.

On different facts, we might conclude that an underlying multiple representation presents a serious question of conflict. In Rivera's case, however, there is nothing more than speculation of possible conflict, which would not pass muster after Mickens or before it. See United States v. Burgos-Chaparro, 309 F.3d 50, 52- . 53 (1st Cir. 2002) (finding "speculation" an inadequate threshold showing by defendant claiming conflicts after Mickens); United States v. Michaud, 925 F.2d 37, 41 (1st Cir. 1991) (rejecting, in pre-Mickens case, conflict of interest claim that was "insufficiently specific" in describing nature of conflict). In order to find an effect from an alleged attorney conflict, "some adverse action or inaction is required that can be traced to the conflict in

loyalty. Merely to speculate that the divided loyalty could have caused such a step is not enough." Burgos-Chaparro, 309 F.3d at 53.

2. Caribe and Nelson

As to Caribe and Nelson, who did not present their claims to the district court, it is the settled policy of this court not to entertain fact-specific ineffective assistance of counsel claims on direct appeal when they have not been raised previously. See United States v. Campbell, 268 F.3d 1,7 (1st Cir. 2001). There is an exception to this rule "where the critical facts are not genuinely in dispute and the record is sufficiently developed to allow reasoned consideration of an ineffective assistance claim." United States v. Netanel, 938 F.2d 302, 309 (1st Cir. 1991). But the exception does not apply to any of the three claims that Caribe or Nelson advances.

Caribe's purported conflict of interest is that one of his attorneys, Jose Aguayo, represented CI Hernandez in a previous case. Caribe says that he was unaware of this previous relationship until after his own trial and would not have accepted Aguayo as his lawyer if he had known. But the factual presentation he makes is inadequate for us to judge the effect of any conflict. Caribe also makes a more common ineffectiveness claim alleging shortcomings in the performance of one of his other attorneys, but it too is very fact-specific and it is supported by no more than a list of

complaints in Caribe's brief. Finally, Nelson's claim, advanced pro se, is even more clearly ineligible for consideration under the Netanel exception. He asserts a conflict of interest based on his lawyer's representation of David Ramos-Rivera, who was not indicted as a defendant in this conspiracy case; Nelson offers no explanation of the supposed conflict. We will not entertain any of these three claims for the first time on the meager record the appellants present to US.[12]

[12] For the same reason, we also reject Rivera's claim, raised cursorily in his appellate briefs and not raised in his motion for I a new trial before the district court, that attorney Vega was further conflicted because of his past representation of Miguel Montanez (a/k/a "Mickey Motors"). Above, we uphold the district court's decision to exclude impeachment evidence from Rivera's trial concerning the alleged connection between CI Hernandez and the Mickey Motors murders. Rivera makes no explanation of how Vega's past relationship with Montanez made any difference to the case, and seems merely to have tacked this claim onto his more sustained argument concerning joint representation with Ortiz.

Appendix A
Slip Opinion of the U.S.D.C. For the District of Puerto Rico

United States Court of Appeals

For the First Circuit

Nos. 00-1422
00-1457
00-1534
00-1560
00-1561
00-1628
01-1150
01-1873
01-2248

Volume II of II

UNITED STATES,
Appellee,

v.

MILTON A. NELSON-RODRIGUEZ; LUIS A. ROMERO-LOPEZ; MIGUEL A. RODRIGUEZ-RIVERA; EDUARDO ARROYO-MALDONADO; CARLOS BONET-GONZALEZ; ANGEL CHEVERE-GONZALEZ; LUIS CARIBE-GARCIA; RAUL RIVERA-PEREZ; VICTOR M. VALLE-LASALLE,

Defendants, Appellants.

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF PUERTO RICO

[Hon. Juan M. Perez-Gimenez, U.S. District Judge]

Before

Boudin, Chief Judge,
Lynch, Circuit Judge,
and Shadur,* Senior District Judge.

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* Of the Northern District of Illinois, sitting by designation.

Marlene Aponte Cabrera for appellant Nelson-Rodriguez.

Rafael F. Castro Lang for appellant Romero-Lopez.

Jose A. Suarez-Santa for appellant Rodriguez-Rivera.

Raymond L. Sanchez Maceira for appellant Arroyo-Maldonado.

Mauricio Hernandez Arroyo for appellant Bonet-Gonzalez.

Raymond Rivera Esteves for appellant Chevere-Gonzalez.

Marlene Gerdts for appellant Caribe-Garcia.

Linda George for appellant Rivera-Perez.

Luz M. Rios Rosario for appellant Valle-Lasalle.

William C. Brown, Attorney, U.S. Department of Justice, with whom H.S. Garcia, United States Attorney, was on brief for appellee.

February 7, 2003

H. Apprendi (Nelson. Rodriquez. Arroyo. Bonet. Chevere. Caribe. Rivera. and Valle)

All of the appellants except for Romero, who pled guilty, argue that their sentences were imposed in violation of Apprendi v. New Jersey, 530 U.S. 466 (2000). Apprendi held that" [o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." Id. at 2362-63. The defendants raise several distinct Apprendi claims, and we address each in turn.

1. Facial Challenge to 21 U.S.C. § 841

The defendants make a facial challenge to 21 U.S.C. § 841.[13] Section 841(a) makes it unlawful for any person to knowingly or intentionally distribute or possess with intent to distribute a controlled substance. Section 841(b) lists the penalties for violation of section 841(a), which vary depending on the drug type and quantity. Defendants say this renders the statute facially unconstitutional.

This argument about § 841 is foreclosed by United States v. Collazo-Aponte, 281 F.3d 320 (1st. Cir. 2002), which held that "there is nothing in the statutory language that explicitly defies Apprendi" because" [t]he statute is silent as to who makes these

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[13] The defendants were convicted under 21 U.S.C. § 846, not 21 U.S.C. § 841, but they challenge § 841 because § 846 makes it unlawful to attempt or conspire to commit the offenses listed in § 841. Therefore, the constitutionality of § 846 is dependent upon the constitutionality of § 841.

findings and under what burden of persuasion." Id. at 325. Our decision in Collazo-Aponte is consistent with the decisions of all circuits that have addressed this issue. See. e.g., United States v. Buckland, 289 F.3d 558, 562 (9th Cir. 2002) (en banc); United States v. McAllister, 272F.3d 228, 232 (4th Cir. 2001); United States v. Brough, 243 F.3d 1078, 1079 (7th Cir.), cert. denied, 534 U.S. 889 (2001).

Collazo-Aponte similarly rejected the claim that § 841(b) includes a mens rea requirement as to the type and quantity of drugs. Section 841(a) requires the defendant to "knowingly or intentionally" possess controlled- substances with an intent to distribute. The defendants argue that this mens rea requirement applies to all elements of the crime, including those listed in § 841(b). However, as we held in Collazo-Aponte, "The plain language of § 841(b) requires the government to prove only that the offense 'involved' a particular type and quantity of drugs, not that the defendant knew that he was distributing that particular drug type and quantity." 281 F.3d at 326. The presumption in favor of a scienter requirement does not apply in this case because the elements in § 841(b) only set the penalty and do not criminalize otherwise innocent conduct.

2. Vague Allegations in Indictment

Defendants argue that the indictment was inadequate in that it made only vague allegations as to the type and quantity of the drugs involved in the conspiracy. It is true that Apprendi considers any fact (other than a prior conviction) that increases the penalty for a crime beyond the statutory maximum to be an element of the crime. But the indictment here easily meets this requirement. The superseding indictment charged that the defendants possessed with intent to distribute over 1,000 kilograms of cocaine, five kilograms of heroin, and 5,000 pounds of marijuana. Furthermore, it provided the drug

type and quantity for each of the planned importations at issue at trial, stating for example that Arroyo and Rivera met "two other persons known to the Grand Jury," CIs Hernandez and Diaz, to discuss the importation of approximately 1,200 kilograms of cocaine into Puerto Rico in May 1997, and that Rivera, Torres, and Chevere received a shipment of 250 kilograms of cocaine in July 1997. Such detail is more than sufficient to meet Apprendi's mandate, and we therefore reject defendants' claim.

3. Lack of Jury Determination of Drug Type and Quantity

Defendants argue that their sentences must be vacated because the jury did not determine drug type or quantity. In fact, the jury verdict sheet asked simply whether a particular defendant was guilty of the one count in the indictment, a copy of which was provided to the jury. The indictment charged that the defendants

> did unlawfully, knowingly, willfully, and intentionally combine, conspire, confederate, and agree together with divers other persons to the Grand Jury known and unknown, to possess with intent to distribute amounts of cocaine, a Schedule II narcotic drug controlled substance, which amounts of cocaine exceeded One Thousand (1,000) kilograms; heroin, a Schedule I, Narcotic Drug Controlled Substance, which amounts of heroin exceeded Five (5) kilograms; and marijuana, a Schedule I controlled substance, which amounts exceeded Five Thousand (5,000) pounds of marijuana

(emphasis added). It also specified particular amounts and kinds of drugs for transactions in which those defendants participated.

We understand the argument to have several parts, including first that the jury, at a minimum, had to decide the drug quantity and type for the underlying conspiracy (to the extent of determining a quantity which sets the maximum sentence under § 841 that would be applicable to the conspirators). The argument moves to another level with the assertion that it was error for the trial judge to deny the requests of several defendants that the jury make an individualized determination as to the drug type and quantity which could be attributed to that defendant. Both arguments have in common the assertion that Apprendi required these issues to be submitted to the jury in light of the fact that the defendants received sentences greater than the default statutory maximum. The relevant default statutory maximum is based on distribution of less than 50 kilograms of marijuana, which produces a maximum sentence of five years for first felony drug convictions and ten years if there is a prior such conviction. 21 U.S.C. § 841(b) (1) (D).

It is common ground, and the government concedes, that the defendants were entitled to some form of jury determination as to quantity -- whether general or individual is a separate question-- before being subject to more than the default statutory maximum. Here, there was no jury determination of either sort. One might suppose from the indictment quoted above that the jury necessarily found the quantities there specified, but in fact review of the jury instructions confirms that the jury was asked only to determine whether there was a conspiracy as charged, not whether it covered any specific amounts of drugs. The government does not claim otherwise.

However, the jury's failure to determine drug type and amount is not fatal if the evidence overwhelmingly establishes the amount. United States v. Cotton, 535 U.S. 625 (2002). In this instance, our review shows that this is so as to all defendants, whether the test is plain error or harmless error and whether the figure relates to the overall conspiracy or to the individual defendant. We will return to these calculations in due course. But for the sake of future litigation, it is useful to say something more about both the requirements for preservation of Apprendi claims and the problem of general versus specific findings as to amount of drugs. We begin with the latter.

In United States v. Derman, 298 F.3d 34, 42-44 (1st Cir. 2002), this court ruled that it was sufficient to satisfy Apprendi if the jury found that the conspiracy charged was to distribute, or possess with intent to distribute, a specific quantity (assuming that this figure triggered the higher maximum sentence at issue). If the defendant were convicted of participating in such a conspiracy, this necessarily meant that he was liable, for Apprendi purposes, for the quantity of the overall conspiracy. We therefore held that there was no Apprendi error where a jury

> has determined that the conspiracy involved a type and quantity of drugs sufficient to justify a sentence above the default statutory maximum and has found a particular defendant guilty of participation in the conspiracy[.] [In this situation,] the judge lawfully may determine the drug quantity attributable to that defendant and sentence him accordingly (so long as the sentence falls within the statutory maximum made applicable by the jury's conspiracy-wide drug quantity determination).

Derman, 298 F.3d at 43.

A number of other circuits have taken the same view as to the issue required to be decided by the jury if the default maximum is to be exceeded. See United States v. Thomas, 274 F.3d 655 (2d Cir. 2001); United States v. Patterson, 241 F.3d 912 (7th Cir. 2001); United States v. Nance, 236 F.3d 820 (7th Cir. 2000). Of course, such a jury determination by itself merely establishes a new statutory maximum under Apprendi; it does not set the defendant's guideline sentence, which will often be less than the statutory maximum and which depends on numerous determinations specific to the individual defendant, including role in the offense, attributed relevant conduct, past criminal history, and the like.

Derman thus answers in this circuit the defendants' claim that they are entitled under Apprendi to a defendant-specific finding by the jury as to the amount of drugs properly attributed to an individual defendant in a conspiracy case. But we recognize that this is not necessarily the last word on the subject. Conceivably, borrowing from related doctrines, one could construct a foreseeability test of some kind -- attributing to each defendant the amount that the individual agreed upon, actually handled, and reasonably could have foreseen that others would handle -- and could ask the jury by special interrogatories to identify such an amount.

Derman itself involved a relatively simple conspiracy: growing marijuana in an underground greenhouse, first on Derman's property, then on another's. See 298 F.3d at 37. In such cases, it would be a simple matter for the government to indict on the charge that a particular defendant joined an agreement to possess the quantity of drugs grown in the greenhouse, with the intent to distribute that quantity, and to seek a special verdict to that effect.

That simple approach may break down for more complex conspiracies involving multiple transactions of different amounts of drugs imported at different times, with a shifting cast of actors. A series of problems implicating sentencing then arises. A particular defendant, for example, may have agreed to import seven kilograms of a drug, but not agreed to import ten, although it was reasonably foreseeable to him that his coconspirators would import ten. Or a particular defendant may have gone in and then out of a conspiracy. See Edwards v. United States, 523 U.S. 511 (1998). There may be one conspiracy; there may be multiple conspiracies. Or a defendant may raise Pinkerton issues. See Pinkerton v. United States, 328 U.S. 640 (1946). Some of these problems might be solved by more specificity in indictments, by tailored instructions, and by special verdicts.

Such an endeavor would pose issues of its own too numerous to recount in full. It would implicate the instructions that define conspiracy, itself a tangled subject with built-in tension. It could also have practical disadvantages for some defendants by compromising later arguments they might otherwise make to the judge concerning the application of the sentencing guidelines. But Apprendi itself is a recent innovation; it is too early to expect all of its implications to be worked out, and only the Supreme Court can provide final guidance. It is enough here that Derman provides provisional guidance for the circuit and that the outcome for the defendants in this case would not change even if Derman were overturned.

In explaining this last determination, we consider first the level of review to which each defendant is entitled and then examine separately the evidence bearing on drug quantity attributable to each individual defendant.

a. Preservation of Objection

Valle's appeal raises the question, new to us, of what must be done at trial to preserve an Apprendi objection. Valle was convicted at the second trial, after the Apprendi decision.[14] In our only case holding an Apprendi objection preserved, the objection was raised both at trial and at sentencing. United States v. Bailey, 270 F.3d 83, 88-90 (1st Cir. 2001). Apprendi is primarily about sentencing, but it also has implications for indictment and trial, at least in relation to a sentence which rests on facts which elevate the sentence above the statutory minimum.

For future cases, we think it sufficient if the defendant raises the issue at sentencing. The defendant, of course, has no interest in being sentenced above the maximum and no incentive to request that the jury specifically determine those facts which would carry him above that level. The government, on the other hand, does have an interest in going above the maximum, so it should bear the burden of requesting submission of the issue to the jury. Further, a defendant will not know whether there is an Apprendi error until sentencing, and then only if the court considers a sentence above the maximum. An objection from defendant at the point of sentencing will be timely.

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[14] Apprendi was decided on June 26, 2000. We have been asked here to evaluate whether there was Apprendi error in two trials, one of which took place before Apprendi was decided and the other of which began after Apprendi. These cases were indicted in 1998, and the first trial came to verdict in October 1999. Five of the six appellants convicted at this first trial were also sentenced before the Apprendi decision; Caribe, the sixth, was sentenced on December IS, 2000. Valle and Rivera were convicted at the second trial, which began in September 2000, after Apprendi.

Rivera requested before the jury was charged that the district court submit the question of drug quantity and type to the jury in a special verdict. Valle joined in this initial objection. Rivera renewed his objection at sentencing, but Valle did not. The government argues that Valle waived his Apprendi claim by failing to renew his objection after the jury was charged or at sentencing. The district court denied Rivera and Valle's request, presumably because this court had not yet held that Apprendi applied to § 846 prosecutions; under prior circuit law, the drug quantity and type determination for sentencing purposes was for the judge to decide. See, e.g., United States v. Lindia, 82 F.3d 1154, 1160-61 (1st Cir. 1996). It was not until January 2, 2001, some three months after the trial judge acted here, that this circuit decided that Apprendi applied to §§ 841 and 846. United States v. Baltas, 236 F.3d 27, 40-41 (1st Cir. 2001).

Thus, this case may be viewed as a transition case to a new post-Apprendi regime, before this court applied Apprendi to prosecutions under §§ 841 and 846. In this transition context, where the defendant did raise the issue and ask for a special verdict, we have sympathy for the argument that this is enough to preserve the Apprendi objection. Still, given Bouslev v. United States, 523 U.S. 614 (1998), the waiver analysis is very complicated and we prefer to assume rather than decide that the issue was preserved in these circumstances.

b. Valle

Valle's sentence of 360 months exceeds the default statutory maximum for cocaine offenses of twenty years and so raises a valid claim of Apprendi error.

The jury found Valle guilty beyond a reasonable doubt of participating in a drug conspiracy. The only transaction in which Valle was alleged to be a participant was the planned importation of

1,100 kilograms of cocaine in the summer of 1997. Therefore the jury must have found that Valle participated in this transaction. The only issue is the type and amount of drugs involved in this transaction, an issue that appears to have been undisputed at trial. See, e.g., United States v. Swatzie, 228 F.3d 1278, 1283 (11th Cir. 2000) (affirming where there was no evidentiary basis for the jury to find that the defendant had possessed cocaine with intent to distribute but that the quantity of cocaine involved was less than five grams).

CI Hernandez testified on direct examination at the second trial that the transaction involved 1,100 kilograms of cocaine. CI Diaz also testified that the transaction was to involve between 1,000 and 1,200 kilograms of cocaine. The drug type and quantity was not the subject of any questions on cross-examination; indeed, defense counsels' questions appear to take the drug type and quantity as a given. Nor did defense counsel raise the issue in closing arguments. Finally, Valle does not point to any evidence on appeal that would cast doubt on the alleged drug type or quantity involved in this transaction. See, e.g., United States v. Martinez-Medina, 279 F.3d 105, 122 (1st Cir. 2002) (dismissing defendants' Apprendi claims under harmless error review in part because neither defendant seriously denied that the conspiracy involved at least five kilograms of cocaine). We thus conclude that the Apprendi error as to Valle was harmless.

c. Rivera

Any Apprendi error against Rivera was also harmless. Rivera was sentenced to life imprisonment, while the default statutory maximum for a defendant with a prior felony drug conviction (such as Rivera) is ten years. The government concedes that Rivera preserved his Apprendi claim because he raised it at trial and at

sentencing. The only issue, therefore, is whether the jury must have found Rivera guilty of conspiring to possess at least half a kilogram of cocaine with an intent to distribute. The trial judge can sentence a defendant with a prior felony drug conviction to life imprisonment based on that amount of cocaine. See 21 U.S.C. § 841 (b) (1) (B) .

At trial, the government produced overwhelming evidence that the transactions in which Rivera participated involved at least half a kilogram of cocaine". CI Hernandez and CI Diaz testified as to the amounts involved in two planned cocaine importations of 1,100 kilograms and 700 kilograms. Torres, the cooperating defendant, testified that Rivera was involved in the successful importation of 250 kilograms of cocaine. Their testimony was supported by evidence from wiretaps and other surveillance. Rivera's counsel did not contest the type or amount of drugs involved in any of these importations at trial. Rivera argues on appeal that the jury could not have been sure of the drug type or quantity involved because these were "dry" conspiracies, which means that the government did not seize any drugs. The amount of the drugs was clear, nonetheless. There is simply no serious argument that the jury could have convicted Rivera believing that he participated in a conspiracy involving less than half a kilogram of cocaine.

Rivera also relies on our decision in Collazo-Aponte to argue that an Apprendi error can never be harmless. That case does not stand for this proposition. The defendant in Collazo-Aponte did not preserve his Apprendi error at trial, which means that this court normally would have reviewed his claim under plain error review and, as part of that inquiry, examined the evidence against him. We did not do so, however, because the government conceded that the error was plain. Collazo-Aponte, 281 F.3d at 324. Thus there was no reason for the court to go through the plain error analysis. Had the

government not made this concession, we would have reviewed the evidence presented at trial to determine whether the defendant's Apprendi claim survived plain error review.

d. Arroyo

Arroyo's sentence of 324 months was also contrary to Apprendi because it exceeded the ten-year default statutory maximum for prior offenders. Arroyo did not raise an Apprendi claim before the district court, and review is for plain error. Arroyo, who was replaced as Rivera's lieutenant when he demanded a million dollars, was connected only to the first planned importation, involving 1,100 kilograms of cocaine. The jury could have convicted him only on this basis. Arroyo did not dispute at trial the drug type or amount involved in this planned importation, nor does he dispute these facts on appeal. Moreover, no jury could have failed to find beyond a reasonable doubt that the conspiracy involved some amount of cocaine, triggering a maximum sentence of thirty years. CI Hernandez testified in great detail about their plans to import 1,100 kilograms of cocaine, and CI Diaz testified to some of the same facts. There was no plain error.

e. Caribe

We review Caribe's Apprendi claim for harmless error because he raised the claim at sentencing. Caribe was sentenced to 420 months, which was above the applicable five-year statutory maximum. This sentence would be authorized by 21 U.S.C. § 841(b)(1)(B) if the conspiracy involved at least half a kilogram of cocaine or more than 100 kilograms of marijuana. Caribe argues that the error was not harmless because the evidence linking him to the drug conspiracy was slim and relied primarily on the testimony of government informants of dubious credibility. The evidence against Caribe was much stronger than his re-telling of it; but he has simply

focused on the wrong target. The jury did convict him of conspiring to possess drugs with an intent to distribute them; the only remaining issue is the type and quantity of the drugs involved.

The jury could not have convicted Caribe without finding that he was involved in the conspiracy's final planned importation. Caribe did not dispute the type or quantity of drugs involved in that plan at trial and does not do so on appeal. CI Diaz testified that the importation involved 700 kilograms of drugs. There is less evidence about the type of drugs involved. Diaz testified only that there were "700 kilos" involved; he never explicitly said what type of drugs the conspirators planned to import, although one question during his cross-examination referred to cocaine, and he did not correct defense counsel. Nonetheless, it does not matter for Apprendi purposes what type of drug was involved. The only drugs charged in the indictment were cocaine, heroin, and marijuana. Under § 841(b) (1) (B), Caribe's sentence was permissible regardless of what type of drugs were involved, as long as the conspiracy involved at least 700 kilograms of any of these types of drugs.

f. Bonet

Bonet's sentence of 360 months was contrary to Apprendi because it exceeded the ten-year default statutory maximum for prior offenders. His sentence would be valid under 21 U.S.C. § 841(b) (1) (D) as long as he conspired to possess with intent to distribute any amount of cocaine or at least fifty grams of marijuana. He argues that we should review his claim for harmless error because his co-defendant Nelson made an Apprendi objection. However, the trial judge required each defense counsel to make their own objections, and Bonet's counsel did not join in Nelson's Apprendi objection. We review Bonet's claim for plain error.

Like Caribe, the evidence tied Bonet to the conspiracy's final planned importation in the fall of 1997. The same analysis that applied to Caribe also applies to Bonet: there was overwhelming evidence of a quantity of "700 kilos," and that quantity of drugs is sufficient to justify his sentence regardless of whether the type of narcotic was cocaine, heroin, or marijuana. See 21 U.S.C. § 841 (b) (1) (B).

g. Nelson

Nelson's sentence of 293 months raises a potential Apprendi issue because it exceeded the ten-year default statutory maximum for prior offenders. His sentence would be permissible if the conspiracy involved at least 50 kilograms of marijuana or any amount of cocaine. See 21 U.S.C. § 841(b) (1) (D). Nelson made an Apprendi objection only during trial; we review his claim for harmless error.

The primary evidence against Nelson at trial concerned the planned importations of 36 kilograms of cocaine and approximately 6,000 pounds of marijuana. The jury could not have convicted Nelson without finding that he was involved in at least one of these ventures. The Apprendi error was harmless because evidence establishing the amount and type of drugs involved in both of these plans was overwhelming and undisputed at trial. CI Hernandez and cooperating defendant Torres both testified that Nelson had attempted to bring 36 kilograms of cocaine into Puerto Rico. There was some dispute as to Nelson's motivations for participating in the transaction, but he never disputed the type or quantity of drugs involved. As to marijuana, the government at trial played a recording of a conversation between Rivera and Nelson in which they discussed importing 6,000 pounds of marijuana. Nelson offered no evidence to rebut this point, and at sentencing did not dispute the contention that the plan involved 6,000 pounds of marijuana.

h. Chevere

Chevere's sentence of 540 months raised a potential Apprendi issue because it exceeded the five-year default statutory maximum. The sentence would be permissible under 21 U.S.C. § 841(b) (1) (A) as long as he was involved in a conspiracy involving at least five kilograms of cocaine or 1,000 kilograms of marijuana. Chevere argues that his claim should be reviewed for harmless error because he says his counsel raised an Apprendi claim at sentencing. The transcript of his sentencing hearing shows that his counsel challenged only Chevere's involvement in the conspiracy and the base level calculation, not the amount or type of drugs. We review his claim for plain error.

Although there was not evidence that Chevere conspired to import marijuana, the evidence did tie him to the successful importation of 250 kilograms of cocaine. Torres, the cooperating defendant, testified that Chevere was in charge of security for that importation. There was no dispute about the type or quantity of drugs involved. Torres was directly involved in the importation and testified that he and the other conspirators imported 250 kilograms of cocaine. He described in detail how he and Rivera split the load and how Rivera planned to send his share to New York for distribution. CI Hernandez also testified that Rivera told him that he successfully imported 250 kilograms of cocaine into Puerto Rico.

Chevere claims that the transaction never took place despite Torres and Hernandez's testimony to the contrary. To support this claim, he points to the fact that the FBI, which had Rivera's organization under surveillance, did not see the delivery of cocaine. However, the jury necessarily found that the transaction did occur, whether or not it was observed by investigators directly. There was

no evidence that this importation involved a smaller amount of cocaine.

i. Rodriguez

Rodriguez's sentence of 151 months was contrary to Apprendi because it exceeded the default statutory maximum of five years. The sentence would be permissible as long as Rodriguez participated in a conspiracy involving any amount of cocaine. We review his claim for plain error because he did not raise it at trial.

The only evidence at trial relating to Rodriguez tied him to the successful importation of 250 kilograms of cocaine. Taped telephone conversations played at trial showed that Rodriguez delivered the cocaine imported in that transaction to New York, where it was distributed by Figueroa, Caribe's brother-in-law. The jury could not have convicted Rodriguez without believing that he was involved in this aspect of the conspiracy. The amount and type of drugs in the successful importation were undisputed at trial, and thus we reject Rodriguez's Apprendi claim.

I. Substantial Assistance Departure (Romero)

Romero pled guilty and presents one issue, a sentencing issue, on his appeal. He argues that the sole reason the government failed to move that he be given a Section 5K1.1 sentence reduction for substantial assistance was an impermissible one: it was in retaliation for his telling the truth in his third debriefing, a truth which was exculpatory as to codefendant Ortiz.

U.S.S.G. § 5K1.1 provides: "Upon motion of the government stating that the defendant has provided substantial assistance in the investigation or prosecution of another person who has committed an offense, the court may depart from the guidelines." See also 18 U.S.C. § 3553(e) ("Upon motion of the Government, the court shall have the authority to impose a sentence below a level established by

statute as minimum sentence so as to reflect a defendant's substantial assistance in the investigation or prosecution of another person who has committed an offense."). Romero's plea agreement stated that" [t]he United States reserves its option to seek any departure from the applicable sentencing guidelines, pursuant to Section 5K1.1 . . . if in its discretion the United States determines that such a departure is appropriate." The agreement further specified that" [t]he defendant agrees that the decision whether to file such motion rests in the sole discretion of the United States."

The district court, after hearing proffers from both counsel, rejected the argument and declined to take testimony from Agent Plichta, who conducted the debriefings at issue here. Romero argued that there was error in not holding an evidentiary hearing and in not compelling the government to file such a motion.

Our review of questions of law is de novo; our review of the fact-based conclusion of the district court as to the substantial assistance question is for clear error. See United States v. Doe, 233 F.3d 642, 643-44 (1st Cir 2000).

Implicit in the question presented is an issue of law: assuming Romero's claims were true, whether it is permissible for the government to decline to seek a substantial assistance departure in retaliation for a cooperating defendant's truthful disclosure of exculpatory information about codefendants. In this area, the government acts under two constraints. First, the law is clear that the government may not base its decision on an unconstitutional motive, such as racial prejudice. See Wade United States, 504 U.S. 181, 185-86 (1992). Second, because the government entered into a plea agreement with Romero, it had to carry out in good faith the obligations it assumed under the agreement. See United States v. Alegria, 192 F.3d 179,186-87 (1st Cir. 1999); see also United States

v. Davis, 247 F.3d 322,325 (1st Cir. 2001). This good-faith requirement applies even though the plea agreement specifies that the "government retains absolute discretion with respect to the filing of a section 5K1.1 motion." Alegria, 192 F.3d at 186-87.

Whether viewed as part of the Wade obligation or the Alegria obligation, the government may not base its refusal to seek a substantial assistance departure on a defendant's truthful disclosure of exculpatory information. We can think of few things more corrosive to the criminal justice system than prosecutorial retaliation against a witness for telling the truth. If these were the government's grounds, they would both be impermissible and have no rational relationship to a legitimate government end. Cf. Davis, 247 F.3d at 326.

The district court held that Romero had not made a threshold showing of improper motivation by the government. See Alegria, 192 F.3d at 187. In explaining to the district court its reasons for not filing a Section 5K1.1 motion, the government used language that was likely to arouse suspicion. It complained that, because of Romero's statements and writings produced at the third of his four debriefings, the prosecution was forced to provide defense counsel with Brady and Jencks material. Appropriately concerned by these statements, the district judge investigated further and took proffers from both counsel.

In the end, the district court was satisfied that the government had reason to think Romero was not truthful at the last two debriefings and, while he had given assistance, he had not given substantial assistance. Romero's untruthfulness was shown by the fact that he did not disclose certain information helpful to Ortiz and Nelson until his third debriefing, and that this newly-disclosed information appeared to be inconsistent with information provided

by another cooperating witness. As the trial judge noted, the government had told the court it intended to use Romero as a prosecution witness at trial but then did not do so. This decision not to call Romero as a witness was entirely consistent with the government's view, expressed at sentencing, that Romero was not truthful. And, as the district court aptly noted, substantial assistance is a higher standard for a defendant to meet than mere cooperation. Romero's failure to be forthcoming in earlier debriefings evidenced his failure to meet this higher standard. When faced with such Section 5K1.1 claims where there is a plea agreement, the government bears the modest burden of production, not persuasion. Alegria, 192 F.3d at 187. The government must offer "facially adequate reasons." Id.. at 188. It did so here. The judge, who sat through a lengthy trial and inquired into this matter, found nothing impermissible about the government's reasons for declining to seek a substantial assistance departure. Given the judge's extensive exploration of the issue with counsel, no separate evidentiary hearing was required.

J. Supervised Release Terms (Bonet and Rodriguez)

Bonet and Rodriguez challenge the length of their terms of supervised release. The district judge sentenced Bonet to twenty years of supervised release and Rodriguez to fifteen years. Both defendants claim that these terms were invalid because they were disproportionately longer as a percentage of their total years of imprisonment than their codefendants' terms. This argument is foreclosed by 18 U.S.C. § 3742(a), which establishes the limited circumstances in which a defendant can seek review of his sentence. As the Seventh Circuit held in United States v. Rios-Calderon, 80 F.3d 194, 198 (7th Cir. 1996), "nothing in § 3742(a) allows review of a sentence imposed in conformity with the Guidelines on the ground

that a codefendant was treated differently." See also United States v. Youngpeter, 986 F.2d 349, 356 (10th Cir. 1993) ("Sentencing differences due to individual conduct as considered by the Sentencing Guidelines does not make a sentence disproportionate.") .

Rodriguez also argues that his supervised release term is barred by U.S.S.G. § 5D1.2. We note at the outset that this claim was nearly forfeited because of the skeletal manner in which it was raised. See Mass. Sch. of Law v. Am. Bar Ass'n, 142 F.3d 26, 43 (1st Cir. 1998) (claim is forfeited if it is raised in a perfunctory manner unaccompanied by developed argumentation). But we will give Rodriguez the benefit of the doubt and find that the claim was not forfeited. Rodriguez's counsel also failed to object to the length of the supervised release term at sentencing, which would normally mean that his claim could be reviewed only for plain error. But we will again give Rodriguez the benefit of the doubt because he was not given advance notice in the presentence report or by the judge or prosecutor that he could be sentenced to more than five years of supervised release, the maximum term specified in the guidelines.

We now turn to the merits of Rodriguez's claim. U.S.S.G. § SD1.2 states that supervised release terms for Class A or B felonies shall be "at least three years &t not more than five years." The relevant statute, 21 U.S.C. § 841(b) (1) (A), provides that the defendant shall be sentenced to a term of supervised release of "at least five years." This court's recent decision in United States v. Cortes-Claudio held that these provisions should be read together to mean that a defendant convicted under 21 U.S.C. § 841(b) (1) (A) can be sentenced to only five years of supervised release unless the judge makes a permissible upward departure from the guidelines. 312 F.3d 17,18-19 (1st Cir. 2002). The judge can make such a departure if he finds that there are aggravating circumstances "of a

kind, or to a degree, not adequately taken into consideration by the Sentencing Commission," and if the parties are given advance notice that the judge is contemplating making such a departure and of the grounds on which the judge is contemplating departing. Id.at 24; see also United States v. Burns, 501 U.S. 129, 138-39 (1991).

The district judge in this case did not anticipate this court's decision in Cortes-Claudio and mistakenly concluded that the guidelines did not apply to the length of a supervised release term imposed under 21 U.S.C. § 841. Thus he did not give the parties notice of a possible upward departure or make the required findings of aggravating circumstances to support the departure. We accordingly vacate Rodriguez's fifteen-year supervised release term and remand to the district court for re-sentencing as to the length of the term of supervised release. On remand, should the district court find that there are aggravating circumstances of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission, it must still give the parties advance notice that it is contemplating departing and the grounds of the possible departure and give them an opportunity to respond.

K. Other Sentencing Guidelines Issues

1. Drug Quantities (Caribe. Bonet. Valle. Chevere. Arroyo. Nelson. Rodriguez)

In sentencing, the district court took into account the amount of drugs that could be attributed to each defendant. Several defendants challenge these determinations, which are distinct from

claims that the determination of quantity by the judge rather than the jury violated Apprendi.[15] We review the trial court's factual determinations at sentencing for clear error. United States v. Damon, 127 F.3d 139, 141 (1st Cir. 1997). Legal interpretations of the sentencing guidelines are reviewed de novo. United States v. Ranney, 298 F.3d 74, 80 (1st Cir. 2002).

a. Caribe

Caribe argues that the court erred in setting his base offense level at 38, which is applicable to a quantity of 150 kilograms or more of cocaine. The court set the base offense level after determining that 745 kilograms of cocaine could be attributed to Caribe. The court held that Caribe was directly involved in the conspiracy to import 700 kilograms of cocaine in the fall of 1997. This determination was consistent with the testimony of CI Diaz, who testified that Caribe was a key player in several meetings to plan the details of this importation. It also attributed to Caribe 45 kilograms of cocaine out of the successful 250 kilogram importation, which he sent to his brother-in-law in New York for distribution. Torres had testified that Caribe was in charge of moving some amount of cocaine up to New York, and that he believed the amount to be "about forty-five"

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[15] As we noted above, Apprendi only requires the jury to determine the drug type and quantity involved in the conspiracy. After the jury has made this determination, the judge can make individualized determinations about the amount of drugs attributable to each defendant. Even though the jury did not make its initial determination, we found no reversible error as to any defendant, so that the judge could still determine the amount of drug attributable to each defendant.

kilograms. It was not clear error for the court to conclude that Caribe was responsible, at least in part, for distributing 45 kilograms of cocaine. This total quantity of 745 kilograms of cocaine supports the court's decision to set Caribe's base offense level at 38.

b. Bonet

The court found Bonet responsible for at least 150 kilograms of cocaine, based on Bonet's involvement with the planned importation of 700 kilograms of cocaine. This determination was not clear error considering Bonet's role in planning this importation.

Bonet argues that the court should have reduced the amount of cocaine attributed to the defendants because of the intensive involvement of CIs Hernandez and Diaz in the conspiracy. This is a type of improper sentencing factor manipulation argument, for which Bonet has the burden. As stated in United States v. Montoya, "garden variety manipulation claims are largely a waste of time." 62 F.3d 1, 4 (1st Cir. 1995). It is insufficient to say that the idea of the conspiracy originated with undercover agents, or that conduct was encouraged by the government, or that the crime exceeded in degree or kind what the defendant had done before. Instead the defendant must show that elements like these were so extensive that "the government's conduct must be viewed as extraordinary misconduct." Id. (internal quotations omitted). This standard is high in part because the defendant has the opportunity to raise an entrapment defense at trial.

Bonet has fallen far short of this standard; he offers nothing more than conclusory allegations. Furthermore, Hernandez testified that the Colombians, not he or Diaz, set the amount involved in the cocaine importations. For example, in the 700 kilogram importation, Hernandez testified that the Colombians wanted the organization to import 700 kilograms of cocaine as a test to determine whether its members had the capability to import larger quantities of drugs in the

future. Bonet also bragged to Diaz that he and his team had been drug trafficking for years. It is unlikely, therefore, that government agents encouraged Bonet or his coconspirators to engage in conduct in which they would otherwise have been unwilling to participate.

c. Valle

Valle argues that the judge erred in attributing at least 150 kilograms of cocaine to him. He did not raise this claim at sentencing, and therefore it is waived. United States v. Shattuck, 961 F.2d 1012, 1015 (1st Cir. 1992) ("We do not review sentencing guideline disputes which were not preserved before the district court."). We have discretion to review waived guidelines claims in "horrendous cases where a gross miscarriage of justice would occur." United States v. Haggert, 980 F.2d 8, 11 (1st Cir. 1992). This is not one of those cases. The evidence overwhelmingly tied Valle to the planned importation of 1,100 kilograms of drugs. CI Hernandez testified extensively about Valle's involvement in this transaction and the amount and type of drugs involved.

d. Chevere

Chevere argues that the district court erred in finding that he was involved in the importation of 250 kilograms of cocaine. Torres testified that Chevere was in charge of security for this successful transaction. Chevere argues that the district court should not have used this transaction to set Chevere's base offense level, because an FBI agent who was watching the delivery location testified that he did not actually see the drugs being delivered. Whether the FBI agent saw it or not, there was ample additional evidence at trial that the transaction took place, and that Chevere was involved in it. There was no clear error.

e. Arroyo

Arroyo argues error in the attribution of 1,200 kilograms of cocaine to him because the government did not show that he had the capability to transport such a large amount of cocaine. Arroyo argues that the government never proved that Arroyo owned a boat that could be used to bring the cocaine to Puerto Rico. Under the sentencing guidelines, if a planned drug transaction does not take place, the sentencing court should base the defendant's drug- quantity finding on the negotiated amount of drugs, in this case 1,200 kilograms. See U.S.S.G. § 2D1.1, cmt. n.12. However, the court can use a lower amount if "the defendant establishes that he or she did not intend to provide, or was not reasonably capable of providing, the agreed-upon quantity of the controlled substance." Id. Thus the burden is on Arroyo to show that he was not capable of transporting 1,200 kilograms of cocaine. Arroyo has not met his burden in this case and there was no clear error.

f. Nelson

Nelson argues that the district court erred in attributing 99.5 kilograms of cocaine to him. The court found that he was involved in the successful importation of 250 kilograms of cocaine and had a role in distributing 50 kilograms from that shipment. Torres testified that Rivera gave Nelson some unknown percentage of Rivera's own share of the cocaine from this shipment. Rivera also gave a percentage of his share to Caribe and to Chevere, but Torres did not know exactly how much each of the three defendants received; he only knew that together they received 50 kilograms. Nelson and Rivera, in recorded conversations, discussed the price at which they would be able to sell the cocaine. The court also found that he had a role in the attempted importation of 36 kilograms of cocaine and the transaction involving 6,000 pounds of marijuana. It also could have

based its overall findings on Nelson's more general involvement in distributing Rivera's share of the cocaine. We see no clear error in the court's conclusion.

g. Rodriquez

Rodriguez argues that the district court erred in determining that his base offense level was 34, which is applicable when the judge attributes at least 15 kilograms of cocaine to the defendant. The government alleged that Rodriguez was involved in delivering to Figueroa in New York approximately 45 kilograms of cocaine from the 250 kilogram shipment. The government introduced taped conversations in which Rivera told Figueroa that he had arranged for someone to deliver the cocaine to Figueroa. The day before, Rodriguez had flown to New York from San Juan. The government also introduced a recording of a conversation in which Rodriguez and Rivera discussed the price of cocaine. At trial, Rodriguez disputed that he had been involved in the cocaine delivery, but the jury could not have convicted Rodriguez otherwise. The only remaining issue is the amount of drugs that Rodriguez brought to New York; Torres testified that Rivera sent "about 45" kilograms there. It was not clear error for the judge to attribute at least fifteen of those kilograms of cocaine to Rodriguez.

2. Minor Participant Adjustment (Bonet)

Bonet argues that the court erred in not granting him a two-level reduction under U.S.S.G. § 3B1.2(b) for being a minor participant in the conspiracy. The commentary to this section states that "a minor participant means any participant who is less capable than most other participants, but whose role could not be described as minimal." U.S.S.G. § 3B1.2(b) cmt. n.5. In seeking a § 3B1.2 adjustment, a defendant "has the burden of proving that he is both less culpable than most others involved in the offense of conviction

and less culpable than most other miscreants convicted of comparable crimes." United States v. Ortiz-Santiago, 211 F.3d 146, 149 (1st Cir. 2000). The court did not err in refusing to grant this adjustment. The testimony at trial showed that Bonet participated in several of the meetings in which the conspirators planned the importation of 700 kilograms of cocaine. Bonet was also responsible for testing the radio equipment that would be used. Finally, Bonet told CI Diaz that he had been part of Rivera's drug trafficking team for many years. It was entirely reasonable to conclude that Bonet was no minor participant.

3. Special Skills Enhancements (Valle and Bonet)

Section 3B1.3 of the sentencing guidelines provides that the district court can increase the offense level two levels if the defendant "used a special skill, in a manner that significantly facilitated the commission or concealment of the offense." The commentary to this section states, "'Special skill' refers to a skill not possessed by members of the general public and usually requiring substantial education, training or licensing. Examples would include pilots, lawyers, doctors, accountants, chemists, and demolition experts." U.S.S.G. § 3B1.3 cmt. n.3. We review the district court's legal interpretation of the term "special skill" de novo and its factual application for clear error. United States v. Noah, 130 F.3d 490, 499 (1st Cir. 1997).

The district court increased Valle's offense level by two levels because it found that Valle was going to be the boat captain for the first planned importation of 1,100 kilograms of cocaine, thus exercising a special skill. Valle did not object to this enhancement at his sentencing hearing, and therefore he waived the claim. Haqqert, 980 F.2d at 10-11. Even if this claim were not waived, the record amply supports the determination.

The district court enhanced Bonet's offense level by two levels because it found that his coconspirators were "counting on his skills as a person knowledgeable with communication equipment." The record establishes that Bonet had a special skill. CI Diaz testified that on October 30, 1997, Bonet conducted a test of the 20/40 radio that the conspirators were planning to use to communicate with the Colombians in order to complete the planned importation of 700 kilograms of cocaine. A 20/40 radio is one that can be used to communicate with any part of the world. Bonet showed Diaz the antenna he had put on a tree outside his house. Bonet then set up the radio and tried to contact the Colombians; unbeknownst to him, the transmission was intercepted by the FBI. Bonet conducted the test over high and low frequency channels and had given the Colombians the same list of frequencies so that the two groups could communicate. This evidence shows that Bonet had a special skill within the meaning of § 3B1.3. Accord United States v. Malgoza, 2 F.3d 1107, 1110 (11th Cir. 1993) (term "special skills" applies to an "advanced level of radio operating ability").

A defendant does not need to have formal education or professional stature to have a special skill within the meaning of § 3B1.3. Noah, 130 F.3d at 500. Instead "a special skill can be derived from experience or from self-tutelage." Id. Nonetheless, the defendant must possess skills that members of the general public would not have. Bonet's knowledge was more extensive than merely turning on a radio and speaking; he also knew how to assemble the radio and its antenna and understood how to determine and locate the frequencies necessary to communicate with the Colombians.

The issue remains whether Bonet's skill "significantly facilitated the commission. . . of the offense." U.S.S.G. § 3B1.3. Diaz did not testify that Bonet would be the person operating the

radios on the day the shipment was delivered. Two reasonable inferences support a determination that Bonet's special skill substantially facilitated commission of the crime. We review both possible determinations for clear error.

First, Bonet's radio test in and of itself aided the conspiracy. He was responsible for making sure that Rivera's organization had the necessary radio equipment to handle such a large importation of drugs. The Colombians would not be willing to entrust Rivera's organization with the shipment if it could not make this showing. Even though Bonet was unable to contact the Colombians during his radio test, it did show Diaz (who, as an intermediary, acted as the Colombians' representative) that Rivera's organization had at least some of the necessary equipment and skills.

Second, an inference that Bonet would be the one operating the radios the day of the shipment could not be clear error. Bonet played an integral part in the meetings. He told Diaz that he was skilled as a boat captain, but that he would not be the boat captain for this shipment. Bonet argues that he never got a chance to use his special skills to the full extent contemplated by his conspirators. However, U.S.S.G. § 2X1.1(a) also covers intended offense conduct that can be established with "reasonable certainty." It was not clear error to conclude with reasonable certainty that Bonet intended to use his special skill to facilitate the crime. See United States v. Downing, 297 F.3d 52, 65 (2d Cir. 2002).

4. Firearm Enhancement (Caribe)

The district court increased Caribe's offense level by two levels because the court determined that Rivera had a weapon in Caribe's presence during part of the planning of the 700 kilogram importation. U.S.S.G. § 2D1.1(b) (1) provides that the judge can increase the offense level by two levels "if a dangerous weapon

(including a firearm) was possessed." The comment to this section states that the enhancement applies if a weapon was present, unless it is clearly improbable that the weapon was connected with the offense. ~ U.S.S.G. § 2D1.1(b) (1), cmt. n.3.

The judge found that Caribe was present when Rivera gave CI Diaz a gun to give to CI Hernandez. Diaz testified that he met with Caribe and Rivera on August 16, 1997. At the end of the meeting, Rivera gave Diaz a gun that he asked Diaz to give to Hernandez. Rivera told Diaz that Hernandez could use the gun if he had to because it was "clean." Caribe claims that he left the meeting before Rivera gave Diaz the gun, but this claim is not supported by the record. Caribe was the last person to arrive at the meeting, but Rivera gave Diaz the gun at the end of the meeting as they were saying good-bye. It was not clear error for the judge to determine that Caribe remained at the meeting at this point.

Caribe next argues that the government did not establish the required nexus between the gun and the conspiracy. The prosecution must show that the defendant (or in a conspiracy case, one of his coconspirators) possessed a weapon during the offense. United States v. McDonald, 121 F.3d 7, 10 (1st Cir. 1997); United States v. Thornton, 306 F.3d 1355, 1358 (3rd Cir. 2002). The prosecution does not have to show that the defendant or his coconspirators actually used the gun in perpetrating the offense or intended to do so. McDonald, 121 F.3d at 10. Once the prosecution has made this showing, the burden shifts to the defendant to establish that a connection between the weapon and the crime was clearly improbable. Id. Caribe argues that the prosecution did not make its required showing because it relied on the uncorroborated testimony of CI Diaz. It is routine, and certainly not clear error, for the trial judge to credit a witness's testimony in making sentencing

determinations, even if the testimony is not corroborated by other evidence. Nor did the judge err in determining that Caribe's coconspirator possessed the gun in connection with the conspiracy.

5. Leadership Enhancement (Caribe)

Caribe next argues that the court erred in increasing his offense level by three levels after determining that Caribe was a manager or supervisor in the organization. Section 3B1.1(b) permits the court to enhance the sentence if "the defendant was manager or supervisor (but not an organizer or leader) and the criminal activity involved five or more participants or was otherwise extensive." The court based its determination on CI Diaz's testimony about Caribe's role in planning the importation of 700 kilograms of cocaine in the fall of 1997. For example, Diaz testified that Caribe "controlled all of the beaches and the group from Humacao, including the captain and the boats." Caribe also told Diaz that Ortiz, who was supposed to captain the boat that would bring the drugs into Puerto Rico, worked for him. According to Diaz, Caribe said that "they" [Rivera and Caribe] had the captains, the boats, and the personnel that was needed to carry out the job." This evidence is sufficient to support the court's determination.

6. Downward Departure Requests (Valle and Nelson)

The district court denied motions by Valle and Nelson for downward departures in their sentences. Valle argues that the district judge abused his discretion by failing to depart from the sentencing guidelines because of a claimed disparity between his sentence and the sentence of some of his coconspirators. The argument fails; a court cannot depart from the sentencing guidelines in order to correct a disparity between the sentences of coconspirators. See United States v.

Ortiz-Santiago, 211 F.3d 146, 150 (1st Cir. 2000) ("Disparity in sentencing amongst coconspirators, without more, is not enough to justify a downward departure.") .[16] Nelson argues for a downward departure based on his necessity defense that he participated in the conspiracy only to save his kidnapped nephew. This was committed to the non- reviewable discretion of the district court. ~ United States v. Romero, 32 F.3d 641, 653 (1st Cir. 1994).

L. Procedural Errors at Sentencing (Caribe)

1. Right to Speedy Sentencing

Caribe claims that his right to a fair trial was violated because of excessive delay in his sentencing. Caribe was convicted on October 1, 1999. All objections to the Presentence Investigation Report were submitted by April 25, 2000, but he was not sentenced until December 15,2000. Thus, over fourteen months passed between the date of conviction and the date of sentencing.

The Sixth Amendment provides that" [i]n all criminal

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[16] It is far from clear that there was any disparity. Valle's sentence of 360 months was greater than four coconspirators' sentences and equal to or less than four other coconspirators' sentences.

prosecutions, the accused shall enjoy the right to a speedy and public trial." U.S. Const. amend. VI. The Supreme Court has not definitively held that this right extends to the sentencing phase. See Pollard v. United States, 352 U.S. 354, 361 (1957) (assuming without deciding that 'the sentence is part of the trial for purposes of the Sixth Amendment). However, most circuits that have addressed this issue have held that the right to a speedy trial extends to this phase. See, e.g., United States v. Yelverton, 197 F.3d 531, 535-39 (D.C. Cir. 1999); Burkett v. Cunningham, 826 F.2d 1208, 1220 (3d Cir. 1987); United States v. Reese, 568 F.2d 1246, 1252-53 (6th Cir. 1977). Several other circuits, including this one, have assumed without deciding that the right extends to sentencing. See, e.g., Katz v. King, 627 F.2d 568, 576 (1st Cir. 1980); United States v. Rothrock, 20 F.3d 709,711 (7th Cir. 1994). No circuit has held that the right to a speedy trial does not apply at this phase .[17]

We assume for the purposes of this appeal that the right to a speedy trial extends to sentencing. We analyze the defendant's claim under the four factors that the Supreme Court set out in Barker v. Wingo, 407 U.S. 514, 530 (1972): the length of the delay; the reason for the delay; the defendant's assertion of his right; and prejudice to the defendant. None of these factors is a necessary or sufficient

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[17] A judge is also required under Fed. R. Crim. P. 32(a) to sentence a defendant "without unnecessary delay." Caribe has not argued that the delay in his case violated this rule, and therefore we do not address whether he would have a possible claim thereunder.

condition to the finding of a deprivation of the right to a speedy sentencing. See id. at 533.

Applying these factors to the case at hand, we conclude that any right to speedy sentencing was not violated. A fourteen-month delay between the date of conviction and the date of sentencing is long enough to trigger an inquiry into the other Barker factors. See Perez v. Sullivan, 793 F.2d 249, 254 (10th Cir. 1986) (finding a fifteen-month delay long enough to provoke an inquiry into the remaining three factors); see also Barker, 407 U.S. at 530 ("Until there is some delay which is presumptively prejudicial, there is no necessity for inquiry into the other factors that go into the balance"); Katz, 627 F.2d at 577 (finding that a four-month delay is "not unreasonable and certainly not of constitutional dimensions") .

Caribe does not make a persuasive showing on any of the other factors. It took approximately seven months for the probation officer to complete the presentence report and for the parties to submit their objections. This time was not excessive given the length of the trial, the number of defendants, and the complexity of the evidence, and indeed Caribe has not challenged this portion of the delay. Much of the later delay can be attributed to Caribe's own motions. He filed a series of motions to continue his sentencing: the first such motions were filed on December 17, 1999 and February 1, 2000 and were denied on January 13, 2000 and February 4, 2000, respectively; the court acceded to later requests from Caribe's counsel to postpone the sentencing, which had been scheduled for February 25, 2000; the court eventually denied Caribe's December 6, 2000 motion to continue his sentencing on December 13, 2000 and sentenced Caribe on December 15, 2000. Caribe also filed a motion for a new trial, which the court denied on December 15, 2000.

Finally, and most importantly, Caribe has not shown he suffered any prejudice as a result of the fourteen-month delay. The prejudice resulting from a delay between indictment and trial is obvious: the accused must live with the anxiety and concern of facing trial; he may have to spend an extended length of time in custody; and his defense may be impaired if witnesses' memories fade. However, "[m]ost of those interests diminish or disappear altogether once there has been a conviction." Perez, 793 F.2d at 256. Thus, the courts have great reluctance to find a speedy trial deprivation where there is no substantial and demonstrable prejudice. Id. Caribe argues that the delay made it more difficult for him to challenge the contested factual allegations in the presentence report, but he does not explain which allegations or how he was prejudiced. He also claims that the delay gave the government more time to persuade the probation officer to include unwarranted enhancements in the presentence report, but as discussed below, Caribe was not prejudiced by these communications. Caribe may have been anxious about the length of the sentence the judge would impose, but such anxiety is present in every sentencing and cannot be sufficient to meet the prejudice requirement.

2. Ex Parte Communications Between Prosecution and Probation Officer

Caribe also argues that the prosecution violated Fed. R. Crim. P. 32(b) (6) (B) by having ex parte communications with the probation officer who wrote the presentence report. Caribe apparently wants this court to eliminate the two enhancements added to his offense level and remand the case to the district judge for re-sentencing.

Rule 32(b) (6) (B) provides:

> Within 14 days after receiving the presentence report, the parties shall communicate in writing to the probation officer, and to each other, any objections to any material information, sentencing classifications, sentencing guideline ranges, and policy statements contained in or omitted from the presentence report. After receiving objections, the probation officer may meet with the defendant, the defendant's counsel, and the attorney for the Government to discuss those objections. The probation officer may also conduct a further investigation and revise the presentence report as appropriate.

The probation officer issued her initial presentence report to both parties on February 3, 2000. This report did not recommend an enhancement for Caribe's leadership role in the conspiracy or possession of a gun during the conspiracy. Caribe alleges that Agent Plichta then met with the probation officer and reviewed the evidence about Caribe's role in the conspiracy. The probation officer then amended her report to recommend a four-level enhancement for a leadership role and a two-level enhancement for firearm possession. Caribe's counsel was not given a chance to rebut Agent Plichta's statements before the amended report was released, although he was able to file formal objections pursuant to Rule 32 and to raise his objections directly to the district court during the sentencing hearing. Caribe filed a motion objecting to the ex parte communications and demanding disclosure of all documents that the probation officer used in preparing the presentence report. The defendant also asked to be able to call the probation officer as a witness at the sentencing hearing to examine the extent of the communications.

Appendix A
Slip Opinion of the U.S.D.C. For the District of Puerto Rico

In a published opinion, United States v. Caribe Garcia, 125 F. Supp. 2d 19 (D.P.R. 2000), the district judge denied the motion. The court held that there was no prosecutorial misconduct because "disclosing information to the probation officer [is] the functional equivalent of disclosing information to the court itself." .Id. at 21. The court also stated that Caribe failed to show that he was entitled to a downward departure given that the presentence report only recommends a sentence and the final sentencing determination is made "after the Court hears arguments and objections to the presentence report in open court." Id. We agree with the second basis for the court's opinion but not the first.

The first issue is difficult because of the discrepancy between the fairly formal procedure contemplated by Rule 32 and the more informal reality. It is common for one side to speak with the probation officer, either before or after the report is released. One district court has stated that, in that court's experience, ex parte communications between the government and the probation officer preparing the report are "appropriate and regular." Roccisano v. United States, 936 F. Supp. 96, 103 (S.D.N.Y. 1996). But we could not fully embrace such informality without reading Rule 32(b) out of the Federal Rules; Rule 32(b) does require a more structured process, at least in the fourteen-day period following the release of the presentence report.

Rule 32(b) is literally read as permitting ex parte communications initiated by either party both before and after this fourteen-day period. During the fourteen-day period, however, while the parties are preparing their written objections to the presentence report, the parties, under the rule, should communicate with the probation officer only in writing, and all communications must be disclosed to the other party. This reading of the rule permits most of

the present informality, while allowing both sides to know the scope of the objections. See Fed. R. Crim. P. 32(b) (6) (B) advisory committee notes to 1994 Amendments (the parties should have a "fair opportunity. . . to review, object to, and comment upon, the probation officer's report in advance of the sentencing hearing"). There are benefits to informality, but the parties should at least know what issues are on the table concerning the presentence report so they can present counter- arguments if they desire.

Even if contact with Agent Plichta did inadvertently violate Rule 32, Caribe has failed to show that he has suffered any harm as a result. First, he does not explain what he hoped to accomplish by additional discovery or by calling the probation officer to testify at the sentencing hearing. The revised presentence report apparently sets forth the additional evidence the probation officer relied upon in amending her recommendations, and all other facts appear to be undisputed. Second, as the district court noted, the report is only a recommendation to the court; the court is not bound to accept these recommendations. The district court in this case had notice that the second report was prepared after the prosecution's alleged ex parte contact and gave Caribe's counsel ample opportunity at sentencing to dispute the report's recommendations. The court then found that the enhancements were appropriate and sentenced the defendant accordingly. Thus Caribe fails to show what harm he suffered as a result of the ex parte communications. See, e.g., Montoya, 62 F.3d at 3 (1st Cir. 1995) (" [T]he sentencing court has ample power to deal with [prosecutorial misconduct impacting the judge's sentencing options] by excluding the tainted transaction from the computation of relevant conduct or by departing from the [recommendation] .").